WAR DEPARTMENT

Military Justice During the War

A LETTER

FROM

THE JUDGE-ADVOCATE GENERAL OF THE ARMY

TO

THE SECRETARY OF WAR

IN REPLY TO A REQUEST FOR INFORMATION

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LETTER OF THE SECRETARY OF WAR.

MARCH 1, 1919.

MY DEAR GENERAL CROWDER: I have been deeply concerned, as you know, over the harsh criticisms recently uttered upon our system of military justice. During the times of peace, prior to the war, I do not recall that our system of military law ever became the subject of public attack on the ground of its structural defects. Nor during the entire war period of 1917 and 1918, while the camps and cantonments were full of men and the strain of preparation was at its highest tension, do I remember noticing any complaints either in the public press or in Congress or in the general mail arriving at this office. The recent outburst of criticism and complaint, voiced in public by a few individuals whose position entitled them to credit, and carried throughout the country by the press, has been to me a matter of surprise and sorrow. I have had most deeply at heart the interests of the Army and the welfare of the individual soldier, and I have the firmest determination that justice shall be done under military law.

I have not been made to believe, by the persual of these complaints, that justice is not done to-day under the military law or has not been done during the war period. And my own acquaintance with the course of military justice (gathered as it is from the large number of cases which in the regular routine come to me for final action) convinces me that the conditions implied by these recent complaints do not exist and had not existed. My own personal knowledge of yourself and many of the officers in your department and in the field corroborates that conviction and makes me absolutely confident that the public apprehensions which have been created are groundless. I wish to convey to you here the assurance of my entire faith that the system of military justice, both in its structure as organized by the statutes of Congress and the President's regulations and in its operation as administered during the war, is essentially sound.

But it is not enough for me to possess this faith and this conviction. It is highly important that the public mind should receive ample reassurance on the subject. And such reassurance has become necessary, because all that the public has thus far received is the highly colored press reports of certain extreme statements, and the Congressional speeches placing on record certain supposed instances of

harsh and illegal treatment. The War Department and its representatives have not been in a position to make any public defense or explanation and have refrained from doing so. The opportunity recently afforded the members of your staff to appear before the Senate Committee on Military Affairs has been an ample one, and it has furnished, I hope, entire satisfaction to the members of that committee. But of the proceedings of that committee I perceived no general public notice; the testimony, when published, will be somewhat voluminous, and its publication will not take place for some time yet, and it will certainly not reach the thousands of intelligent men and women who read the original accounts. And yet it is essential that the families of all those young men who had a place in our magnificent Army should be reassured. They must not be left to believe that their men were subjected to a system that did not fully deserve the terms "law" and "justice." And this need of reassurance on the part of the people at large is equally felt, I am sure, by the Members of Congress in both Houses, who have of course not yet become acquainted with the proceedings before the Senate committee. It is both right and necessary that the facts should be furnished. It is indeed a simple question of furnishing the facts; for when they are furnished, I am positive that they will contain the most ample reassurance.

Those facts are virtually all in your possession, on record in your office. I am aware that they are voluminous and that a complete explanation and answer to every specific complaint is impracticable. But I believe that you are in a position to make a concise survey of the entire field and to furnish the main facts in a form which will permit ready perusal by the intelligent men and women who are so deeply interested in this subject.

I have been asked by a Member of the House of Representatives to furnish him with such a statement. And I am now calling upon you to supply it to me at your early convenience.

Faithfully yours,

NEWTON D. BAKER,
Secretary of War.

To Maj. Gen. E. H. CROWDER,
Judge Advocate General, War Department,
Washington, D. C.

LETTER OF THE JUDGE ADVOCATE GENERAL.

MARCH 10, 1919.

DEAR MR. SECRETARY: On March 1, 1919, you addressed to me a letter concerning the recent criticisms uttered upon our system of military justice, and asking me to make a concise survey of the entire field and to furnish the main facts in a form which will permit ready perusal by the intelligent men and women who are so deeply interested in the subject. On March 8 I replied to you, giving you a brief and concise survey of the field of controversy; but the limitations of that letter made it impracticable for me to deal with the subject in all its scope. The subject is one in which it needs only to set forth the facts, based on the records of my office, in order to perceive the injustice of the charges that have been made. This exposition of facts must be directed to each one of the main charges that have been voiced on the floor of Congress and in the press.

In my first letter to you, dated February 13, forwarded by you to the chairman of the Senate Committee on Military Affairs, and subsequently printed in the Official Bulletin of March 5, the six general criticisms voiced by Senator Chamberlain were dealt with at great length by statistical tables compiled from the records in my office. But these tables are, perhaps, too voluminous for ordinary perusal; and, on the other hand, the letter did not deal with a number of other specific criticisms made by other Members of Congress in the press. I have, therefore, gone over the entire subject so as to include a number of additional points of criticism, and have dealt with the specific points of Senator Chamberlain by omitting the elaborate statistical studies contained in my first letter.

It is my belief that the intelligent public, particularly the members of the legal profession and of the press, would welcome such an exposition of the facts; because the case is one in which it is necessary only to peruse the facts in order to estimate at their true value the criticisms, made in haste and based upon such imperfect and misleading data.

Before proceeding to set forth these facts, I will take a few words to indicate my own attitude toward the standards of military justice.

In 1888, while still a lieutenant of Cavalry, some years before I entered the Judge Advocate General's Department by detail, I addressed a letter to Col. G. Norman Lieber, then Acting Judge Advocate General, inviting attention to the necessity for a revision of the military code. Col. Lieber declined to take up the matter, fearing that the code might suffer in essential features by a revision which might adapt it too much to the methods and traditions of

civil practice. Again in 1896, noticing that Congress had enacted a statute for the revision of all statutes, and knowing that the commission appointed under the terms of that statute would necessarily consider the Articles of War, I addressed a second letter to the then Gen. Lieber, Judge Advocate General, asking his attention to the opportunity this afforded to secure a proper revision of the Articles of War. He again declined to take up the matter, remarking that he felt that the code needed very little, if any, revision, and that if he had the entire responsibility of revising it he would limit himself to the eliminating of obsolete articles and a rearrangement of the code. Again in 1903, while Chief of the First Division of the General Staff, I prepared a draft of revision of the military code and submitted it to the Secretary of War in December of that year for his recommendation to Congress. This came to nothing. In 1911, upon becoming Judge Advocate General, I renewed my efforts, which continued for the ensuing five years and through three Congresses. The revision of 1916 was the culmination of this series of proposals. This record, therefore, must be some testimony to the fact that my attitude toward the improvement of the military code has been an advanced one, at least in comparison with the attitude of others whose authority was superior to mine at the time, and that these convictions of mine are publicly on record for a period of at least 30 years past.

These few facts will indicate that I am, at any rate, not one who has been satisfied with anything less than the highest standards of justice for embodiment in our code of military law; and that my constant and urgent efforts have been devoted to maintaining those standards and to improving their code whenever it seemed to me to fall short of those standards. It was with this spirit that my office proceeded with the administration of military justice when this country entered the great war, and the American Army, enlarged manyfold, was certain to put our system to such a test as it had never before experienced in our entire history. The staff of the Judge Advocate General was gradually enlarged from about 30 officers to more than ten times that number; and all of the new judge advocates were, of course, taken direct from civil practice, with little or no experience in the military practice of the National Guard. Thus the assurance was plain that the spirit and traditions of the criminal common law, with all its safeguards for the accused and of its guaranties of full and fair trial, would dominate in the work of the judge advocates.

I mention these facts as demonstrating that it is humanly improbable that any state of things, even remotely justifying some of the extreme epithets recently used in public criticism, could have existed in our Army during the last two years.

I must further digress for a moment to state the extent of my own personal responsibility for the administration of military justice during the last two years. Appointed Judge Advocate General February 15, 1911, and reappointed upon the expiration of the first term of four years in 1915, I was in active charge of the Office of the Judge Advocate General from the outset of the war to the end of 1917. In the meantime, on May 22, 1917, I was detailed as Provost Marshal General and vested with the execution of the selective draft. I divided my time during the remainder of 1917 between the two series of duties. In the meantime, Brig. Gen. S. T. Ansell, as senior officer on duty in the Judge Advocate General's Office, after August, 1917, acted upon a large share of the office work without submission to myself. In February, 1918, a branch office of the Judge Advocate General's Office was established in France and Brig. Gen. E. A. Kreger was appointed as Acting Judge Advocate General in that position. In December, 1917, at your request, I arranged to divide my time about equally between the Office of the Judge Advocate General and that of the Provost Marshal General; but Gen. Ansell continued to have detailed supervision over the section of military justice. Later, viz, during the months of May and June and parts of April and July, Gen. Ansell was absent in France on inspection duty, and during his absence Col. J. J. Mayes was senior officer and supervised all details of administration of military justice. The remainder of 1918, after July, Gen. Ansell again became senior officer in charge of that subject. Meanwhile, the Military Justice Division of the office had been enlarged so as to comprise nearly 50 officers on duty in Washington. Thus during the latter quarter of 1917 and the whole of 1918 the rulings upon individual court-martial cases did not come to my personal attention, except in rare instances, and did not usually bear my signature. Nor were the rules of the administration, so far as framed in my office during that period, personally framed or passed upon by myself, with a few important exceptions to which I will later allude.

What I wish to make clear is that, so far as my active approval or disapproval is concerned, there was no time during the latter part of 1917 and the whole of 1918 when a court-martial ruling or a rule of practice could not have been made or put into effect by the senior officer in supervisory charge of military justice, without personal submission to myself. More specifically, had either of the above-named senior officers found reason sufficient to himself to alter the practice in any detail or to disapprove any individual court-martial sentence, he was in a position to exercise free responsibility to do so without prior approval of myself. An important exception to this statement is the rule known as General Order No. 7, 1918, of which later explanation will be made.

But this circumstance, that I was not personally responsible for the details of administration of military justice during the above period and that another officer was thus responsible, does not, of course, alter the fact that up to the latter part of 1917 I did share completely that personal responsibility. Moreover, whatever my personal responsibility, or lack of it, for individual measures or court-martial rulings, I am, of course, responsible for the structure and methods of military justice as they existed at the time of our entrance into the war—responsible, that is, in so far as the Judge Advocate General's views were consulted by the Secretary of War and by Congress in the framing of the statutes and the regulations, and in so far as those statutes and regulations were enforced in the field and in my office. And it is because of that responsibility, and because of my firm belief in the merits and high standards of our system of military law, that I am now concerned in pointing out the facts which vindicate it from the recently published reproaches. Regardless of my share of responsibility during 1917 and 1918 for the operation of the system, I could not have performed the duties of that office up to that period without being vitally interested in vindicating the honor of the Army and War Department as involved in the maintenance of that system.

I propose now, first, to refer to certain individual cases recently criticised; next, to comment on the general defects alleged to exist in the system of military justice; and then to close with some recommendations.

I. INDIVIDUAL CASES CITED FOR CRITICISM.

In the recent speeches uttered on the floor of Congress, in the two or three press articles, and in some of the testimony given before the Senate committee and published in the press, certain individual cases of court-martial judgments are cited as notable instances of injustice.

In this letter it is virtually impossible for me to set forth the explanation that can be made for each of these cases. The majority of them are cases in which the sentence is said to be excessively severe; on this general topic of severity I will later offer what needs to be said. Other cases are supposed to be marked by some other form of injustice or illegality. To comment adequately on all these and other cases, which from time to time may be cited, would here be needless and impracticable. I have, therefore, gather all these cases in an appendix which schedules each case thus cited and makes such explanation as our records afford; and this schedule of individual cases I will file with you for reference. In the meantime, I think that I can allay the apprehensions that have been excited by the public allusion to these cases if I take two or three of the most typical and show how groundless are the criticisms.

This first case cited in a speech in the Senate is that of a soldier at Camp Gordon (record No. 110595, tried January 24, 1918), who, while patroling the town as military police, was found at midnight in a shop just after a burglary. Being charged with burglary, he asserted that he had entered the shop in search of the burglars. His story was disbelieved, and he was found guilty; the first finding had been not guilty, but at the commanding officer's request there was a reconsideration, and the second finding was guilty. On revision of the record no legal error could be found, but this office reached the opinion that though there was sufficient evidence to sustain the finding, the evidence did not go so far as to show his guilt beyond a reasonable doubt. In such a situation no supreme court in the United States (with three or four exceptions only) would interfere and set aside a jury's verdict. Nevertheless, this office recommended a reconsideration of the verdict by the reviewing authority. It was in fact reconsidered, but the reviewing authority adhered to the finding. But the feature for emphatic notice is that reconsideration was given, not by exercising the "arbitrary discretion of a military commander," but by *referring the case to the judge advocate of the command, as legal adviser.* The judge advocate wrote an elaborate review of the evidence, disagreeing with the view of this office and recommending confirmation, and the commanding general followed this opinion of his law officer

This case, therefore, instead of being, as the critic had been led to believe, an illustration of "the control which the military commander exercises over the administration of civil justice," illustrates exactly the opposite. For, in the first place, the confirmation of the sentence was made, not by the arbitrary military discretion of the commanding officer, but upon the legal opinion of his Judge Advocate; and, in the second place, the reconsideration which was actually given by the Judge Advocate, on the point of proof beyond a reasonable doubt, was a measure of protection which the law does not provide in any civil court in the United States for the control of a jury's verdict. The case is a good illustration of a feature in which the system of military justice sometimes does even more for the accused than the system of civil justice.

Another case cited on the floor of Congress is one of disobedience to orders to drill and of having seditious literature in possession for distribution. The offender was a conscientious objector who had not been given an opportunity for noncombatant service and who was not attempting nor intending to distribute the literature. The sentence was death; but the critic adds that it was "disapproved by the President, and the prisoner discharged," and he expresses the hope that "the President will exercise the same clemency and show the same mercy in many other cases." Now, the facts of the record demon-

strate the precise opposite of what the critic was led to believe; because in this case (record No. 116790, tried June 17, 1918) it was *not* the President's *clemency* that discharged the prisoner; it was the effective *operation of that very system of military law* which the critic supposes not to exist. What happened was that the Judge Advocate General's Office recommended disapproval of the sentence, on the strictly legal grounds that the order to drill was (under General Orders, No. 28, 1918) not a lawful command, and his disobedience was therefore not an offense; and that there was no evidence of the accused's intention to distribute the literature. The sentence was therefore disapproved and the prisoner discharged on the legal grounds stated by my office. This case, therefore, far from illustrating the critic's thesis, rather affords an illustration of the operation of military law and justice in entire analogy to that of civil law and justice.

Another case, cited in the newspaper article read into the Congressional Record (Cong. Rec., vol. 57, No. 44, Jan. 23, 1918, page 1988), concerns two death sentences imposed in France for sleeping on post in a front-line trench. There are really three distinct questions involved in those cases—first, whether a sentence of death in all cases of this offense should be the inexorable policy; secondly, whether, if not, these particular cases showed sufficient extenuating circumstances; and, thirdly, whether the cases were fairly and fully tried to get at the facts.

Upon the first question it is enough here to say that General Pershing especially urged the importance of adopting this policy for the protection of his Army's welfare; and his chief law officer concurred in this message; and that under such circumstances no one could have been criticized for acceding to this urgent request and adhering to the principle handed down by all the fixed traditions of military law. I, myself, as you know, was at first disposed to defer to the urgent recommendation of General Pershing, but continued reflection caused me to withdraw from that extreme view, and some days before the case was presented for your final action the record contained a recommendation from me pointing in the direction of clemency.

Upon the second question, it can be stated that, except for the youth of the offenders (they were about 20 years of age), there were no special extenuating circumstances. The task laid upon these soldiers was no greater in its exactions than was laid upon hundreds of others at the very same moment in the allied forces doing duty in the trenches. The Chief of Staff's memorandum states the situation with great force:

> The American Expeditionary Force is confronted by the most alert and dangerous foe known in the history of the world. The safety not only of the sentinel's company but of the entire command is absolutely dependent on the vigilant performance of

his duties as a sentinel. The safety of that command depends in an equal measure upon the prompt and complete obedience of the different men to the lawful commands of their superior officers. There is no doubt but that the members of this court had had the necessity for the alert performance of the duties of a sentinel strongly impressed upon them at the immediate time of the commission of those offenses. Before daylight on the morning of November 3, 1917, the first attack by the Germans upon the American lines took place. A salient near Artois, which was occupied by Company F of the Sixteenth Infantry, was raided by the Germans, who killed 3 of our men, wounded 11, and captured and carried off 11 more. The very next night—that is the night of November 3–4, 1917—Private Sebastian was found sleeping on his post, and on the night of the 5th, Private Cook was found sleeping on his post. Both of these men belonged to the regiment which had suffered in the German raid of the 2d and 3d. This condition of affairs presented an absolute menace not only to that portion of the line held by the American, troops, but to the French troops in the adjacent sectors.

That the decision to exercise clemency was a sound one, I do not doubt. But no candid reader of the record could look upon these cases as anything but a distressing instance of the inevitable mental conflict that arises between the stern necessities of war discipline and the natural human sympathy for men who have incurred the death penalty—a conflict which equally agitates every civil judge and every civil executive when such a case is presented for his action. It is unconscionable that this situation should be cited as a peculiarity of the military system.

The third question—whether the case was fairly and fully tried so as to present all the facts—would require too extended a survey for giving all the details here. I content myself with assuring you (what you indeed know already) that the record was scrutinized by several of the most experienced judge advocates of my staff, as well as by myself personally; and that, although the cases were not tried as thoroughly as they could and should have been tried, where the death penalty was involved, nevertheless no reversible error was found and there was no doubt of the facts, in either case. The only issue in this case was the severity of the sentence, as above mentioned.

These illustrations must suffice for the present to show how unreliable have been the public citations of individual cases of supposed injustice. What the source of information has been for each of these cases, I am not aware. But I believe that I am justified in assuring you that it would be a mistake for the intelligent public to assume, when an individual case of supposed injustice is cited, that there is necessarily any ground for believing that injustice has been done. The information seems to have come from such partisan sources, and there are so many hundreds, that it is natural to find the details gradually altering themselves, in transmission, so that the case as stated becomes one of obvious injustice, and yet the case in its actual facts was nothing of the kind. How unreliable are these citations of supposed cases of injustice can be seen in the circumstance that out of the several scores of cases recently cited

in a speech on the floor of the House (Cong. Rec., Feb. 22, p. 4640) and cited with the detail of general court-martial number and place of trial and name, it has thus far proved impossible to find and identify more than a small fraction of the cases in the records of this office, owing to errors in the citations.

I must, therefore, so far as individual cases are concerned, content myself with giving you the assurance first, that this office is ready and anxious to investigate and supply full explanation for every case that can be identified, and secondly, that so far as such investigation has thus far been able to be made the cases, with few exceptions, reveal that they merited no such public statement.

What is really at issue, however, is the general state of things in the administration of military justice; i. e., whether there do exist specific shortcomings of law or of method which in themselves permit and have permitted the doing of injustice in any appreciable fraction of cases. It is to that real issue that I now address myself.

II. GENERAL PRINCIPLES AND METHODS IN MILITARY JUSTICE.

Assembling the various criticisms of a general nature, they seem to be reducible to the following heads:

1. That the general treatment of accused soldiers is not according to the rigid limitations of law as embodied in the Criminal Code, but is according to the arbitrary discretion of the commanding officer in each case.

2. That the military Criminal Code itself is not modern and enlightened, but is an archaic code which systematically belongs to medieval times.

3. That a soldier may be put on trial by a commanding officer's arbitrary discretion, without any preliminary inquiry into the probability of the charge.

4. That commanding officers do thus put on trial a needlessly large number of trivial charges.

5. That the court-martial is composed of and the defense is conducted by men not acquainted with military law.

6. That the Judge Advocate combines incongruously the functions of prosecutor, judicial adviser of the court, and defender of the accused.

7. That second lieutenants "knowing nothing of law and less than nothing of court-martial procedure" are assigned to the defense of "enlisted men charged with capital or other most serious offenses."

8. That a plea of guilty is received from an accused on a charge for which the sentence of death may be imposed.

9. That commanding generals, as reviewing authorities, send back for reconsideration judgments of acquittal.

10. That the judgment of the court is kept secret until after the action of the reviewing authority is taken, even when the initial judgment is an acquittal.

11. That the sentences imposed by courts-martial are as a rule excessively severe.

12. That the sentences imposed by courts-martial are variable for the same offense.

13. That the Judge Advocate General's office either partakes in the attitude of severity or makes no attempt to check it by revisory action.

14. That the action taken in the Judge Advocate General's office is ineffectual to enforce military law and procedure, because its rulings do not have the force of a Supreme Court mandate, but are only recommendatory, and are either ignored by the division commanders or vetoed by the Chief of Staff.

I will now take up these assertions briefly in succession.

1. That the General Treatment of Accused Soldiers is not According to the Rigid Limitations of Law as Embodied in the Criminal Code, but is According to the Arbitrary Discretion of the Commanding Officer in Each Case.

The complete refutation of this assertion will appear very plainly in the answers to the other specific criticisms, which are merely details of this general charge; but in order to gather the full force of the answers which will be made to those more specific criticisms it is necessary to keep in mind the general structure and machinery of the military courts. It may be supposed that the intelligent public in general is not aware of their essentially legal nature and procedure. The public impression perhaps has been gained that there is substantial correctness in the language of one of the Members of Congress:

> The records of the courts-martial in this war show that we have no military law or system of administering military justice which is worthy of the name of law or justice; we have simply a method of giving effect to the more or less arbitrary discretion of the commanding officer.

As a concrete demonstration of the incorrectness of this assertion, the facts, later to be cited, taken directly from the records of courts-martial appealed to by the critic, must suffice as a principal refutation.

And yet the critic's remarks call for more than the citation of concrete facts to the contrary. The substance of my counterassertion is that although the theory of military justice does differ slightly from the theory of civil justice, yet in substance and in practice both of them, in our inherited Anglo-American system, are fundamentally identical, in that justice is founded upon and strictly limited by the requirements and safeguards of strict rules of law.

The only kernel of correctness in the abstract statement made in Congress is that the *theory* of military justice is in its general purpose somewhat different from the theory of civilian criminal justice. The contrast of theory between the two is well set forth in a statement of

Gen. William T. Sherman, made 30 years ago, in discussing our Articles of War. He says:

> The object of civil law is to secure to every human being in a community the maximum of liberty, security, and happiness, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the Nation.

This definition of Gen. Sherman shows that the objects to be attained are different, in that military justice aims to make the man a better soldier or to eliminate him from the military organization if he can not be improved, while civilian justice looks to the ultimate protection of the community at large.

But, once this difference of theory and purpose is conceded, the two systems proceed in identical *method*, viz, by the application of strict rules and regulations so drawn as to give equal and fair treatment to all men, and to protect them against mere arbitrary discretion on the one hand, and the inflexible rigor of automatic penalties on the other hand.

The former end is obtained by a system of courts, procedure, and definition of offenses which contains the counterpart of civil justice in virtually every respect; and the latter aim, viz, to protect the offender from the harsh consequence of rigid penalties, is secured by the method of indeterminate sentences for virtually all military sentences. In a few words, let me set forth the way in which this system operates.

The system of courts, procedure, and defined offenses is one of law and order and not one of arbitrary discretion of the commanding officer. The proceedings follow the fundamentals of our criminal common law—the accused has his challenges; he may have process for his witnesses; he has counsel without cost, either selected by himself or assigned by the proper authority; he is not compelled to testify against himself; he is furnished on request a copy of the testimony and proceedings. The proceedings are so conducted as to preserve for scrutiny of a superior authority every point of law that can be raised for the protection of the accused. This record of proceedings goes up to the reviewing authority and then to the Judge Advocate General. The Judge Advocate General's rulings on revision represent all those legal principles which are required by law and regulations to be observed. How completely legalistic is this scrutiny of the trial record can best be shown by reproducing here from Form No. 16 the fundamental points to be observed in every general court-martial trial before it receives approval in the Judge Advocate General's Office. This form is known as Form No. 16, and upon the initial examination of the record these questions must all be answered, before sending the case to the Chief of the Division of Military Justice:

Was court ordered by proper authority?
Are all orders showing membership of court properly entered in record?
Does record show place, date, and hour court convened?
Are all members of court, judge advocate, and assistant judge advocate accounted for as present or absent?
Was accused given opportunity to introduce counsel?
Was reporter sworn?
Was interpreter sworn?
Was accused extended right of challenge as to each member of court?
Was action of court upon challenges regular and properly taken?
Was the court sworn?
Was the judge advocate sworn?
Was the assistant judge advocate sworn?
Was the accused properly arraigned?
Are charges and specifications and name of officer signing charges copied into record?
Was the trial within statute of limitations?
Are pleas of accused regularly entered?
Were the witnesses sworn?
Are the findings properly entered?
Is the record properly authenticated?
Is the action of reviewing authority properly entered in record and signed?
In case of adjournment or continuance, are each day's proceedings properly signed by judge advocate?
After each adjournment during trial is presence or absence of members of court, judge advocate, assistant judge advocate, accused, his counsel, and reporter properly accounted for?
Did all members who participated in proceedings in revision vote on original findings and sentence?
Were pleas of guilty properly explained by president of the court?
Were rights of accused as a witness properly extended and explained?
Does each specification state an offense under the Articles of War?
Are the findings legal?
Is the sentence legal?
Does the evidence sustain the findings of the court?
Is the action of the reviewing authority legal and properly taken?
Does any ruling of the court on the admission of evidence or other matters affect the substantial rights of accused?
Did the court have jurisdiction of person and offense?

Such are the fundamental points of law which must first be verified before the record proceeds further in the office. But this is only the beginning of the scrutiny. The Office of the Judge Advocate General in the Division of Military Justice is divided into several sections according to the nature of the sentence imposed, viz, disciplinary barracks cases, retained in service cases, penitentiary cases, death and dismissal of officers cases. In the first two branches, including the minor sentences, the case is initially verified and approved or disapproved by one officer; the allotted number during the greater part of 1918 was 10 majors in this branch; the record then goes to the chief of the section. Thus two officers under the Judge Advocate General must pass upon cases of this class. The same is true of the section dealing with sentences not including dishonorable discharge

(retained in service). In both these classes of cases written opinions are prepared only where the cases involve some new or important point of law or some serious irregularity or an unduly severe sentence. In the third section, that of penitentiary cases, to which six majors are allotted, the written opinion is required in every case; one officer prepares this opinion, and it then passes to the chief of the section for his approval; if both officers approve, it then passes to the board of review, consisting of three other officers, acting as an appellate court, each of whom must concur in approval of the opinion (or note his dissent) before the opinion is transmitted to the Chief of the Division of Military Justice; finally the opinion must be approved by the chief of that division. Thus, for cases of penitentiary sentences, six officers must have scrutinized the case and concurred in or dissented from the final opinion before its submission for signature to the Judge Advocate General. In the fourth section, dealing with cases where the sentence is death or (for an officer) dismissal, again a written opinion is required in every case, and in this instance the chief of the section, upon receiving that opinion, assigns it to a second officer who makes an independent examination and review; if the second officer concurs in the first opinion, the chief of the section may then approve it and send it further upward; but if the second officer does not concur, the case is handed to a third officer for examination; not until two officers concur in an opinion does the chief of the section accept it and approve it and send it onward; it then arrives at the board of review, where each of the three officers on the board of review must concur in the final opinion; it then goes in to the Chief of the Military Justice Division for his sanction. Subject to office changes in procedure from time to time, the foregoing is substantially the course of examination of court-martial cases which has been in vogue heretofore in my office. Thus in these most serious cases seven officers must have passed upon the case before it arrives finally for the signature of the Judge Advocate General. Moreover, the board of review is a double one, like some appellate courts, having two branches, each composed of three officers; during the past six months or more these six officers represent one former chief justice of a State supreme court (who resigned his office to become judge advocate), one former justice of nine years' incumbency on the Philippine Island Supreme Court, two professors of criminal law from leading universities, who have been between 15 and 20 years at the bar, and two other eminent practitioners of equal or longer legal experience before their appointment as judge advocates. It may be safely asserted that in no State of the Union is any more thorough scrutiny given to the record of a criminal case than is given in my office, and that in most State supreme courts the scrutiny does not approach in thoroughness the methods here employed.

Moreover, it should also be kept in mind that the accused under the system of military justice enjoys an advantage which does not exist in civil justice, viz, the automatic appellate examination of every serious case. In civil justice there is no appellate or revisory action unless the accused has the moral aggressiveness to insist upon it, and possesses the money (or the friends who will contribute the money) to print the record and to retain counsel who will argue the case on appeal. But every soldier is assured not only of an automatic appeal, as a safeguard against illegal or unfair condemnation, but also of a double appeal in serious cases. The proceedings (except in case of inferior courts, corresponding to petty police courts, and having power to impose only short sentences of imprisonment) are taken down verbatim, and every word of the testimony, every ruling of the court, and every claim of counsel is submitted, first, to the reviewing authority in the field. This authority is the commanding general who appointed the court and who in all serious cases (practices vary somewhat in the different divisions) submits the case to the judge advocate of the division for a quasi judicial opinion. This judge advocate, having the rank of a major or lieutenant colonel, has been, since September, 1917, in almost every instance a lawyer fresh from civil life, chosen for his high standing, and imbued with the standards and traditions of civil practice rather than those of the Regular Army; hence, likely to give fully as careful scrutiny as any civilian judge would give. If the reviewing authority approves the judgment, it then goes on, if a general court-martial case, to the Judge Advocate General at Washington for the second appellate scrutiny (if in France, to the Paris branch office of the Judge Advocate General's Office); the method of scrutiny in this office has been above described. It goes finally to the Judge Advocate General or to the senior officer acting as Judge Advocate General for military justice, who appends his signature if satisfied. Every general court-martial case thus obtains thorough scrutiny in two separate stages.

Putting together these features of the automatic appeal and the thorough scrutiny of all general court-martial cases by at least three superior officers, and in some classes of cases by eight superior officers, before final disposal, it is believed that no such guaranties for the protection of the accused, in the scrutiny of the trial courts' judgment in criminal cases, exist in any civilian system in the United States. I take consolation in believing that if the public at large and particularly the families of those men who have been subjected to military discipline during the past two years could realize the thoroughness of this system, they would feel entirely satisfied that the system is calculated in its method to secure ultimate justice for every man; and that the instances where this result is not obtained must be exceptional only. In the foregoing description, I have tried to make

it possible for the intelligent civilian to visualize the military procedure as it really is, and not as it exists in the fervid imagination of those who do not know it and have never tried to understand it.

The other chief stage in military justice, viz, the stage of the serving of the sentence, has for its aim, as already stated, to protect the offender from the harsh or unequal consequences of a rigid system of penalties. It attains this end by a method of indeterminate (or probationary) sentences. It is not generally known, I presume, that the only War Department prisons to-day in the United States are the three so-called Disciplinary Barracks, viz, at Fort Leavenworth, Kans., at Fort Jay, Governors Island, N. Y., and at Alcatraz, San Francisco, in which are served substantially all sentences of imprisonment for military offenses other than the short terms (less than six months) served in the camp guardhouse. In these disciplinary barracks, every sentence is indeterminate as to its minimum, i. e., virtually a probationary sentence for every man whose offense is not so heinous as to require immediate separation from the Army. Speaking generally, soldiers convicted of purely military offenses, i. e., desertion, mutiny, absence without leave, disobedience to officers, assaulting an officer, etc., etc., are sent to these barracks; the penitentiary being used (except in rare and heinous cases) only for those offenses involving murder, forgery, embezzlement, or other civil crimes. The indeterminate or probationary sentence having no minimum, only a maximum, the confinement may be terminated at any time, and the offender (except in the unusual case where a sentence of dishonorable discharge has not been suspended) may be restored to duty in the Army whenever his record of intelligence and good conduct justifies the commandant of the disciplinary barracks in so recommending; and hundreds, if not thousands, of offenders have been so restored since the beginning of the war.

I can not forbear, at this moment, to cite as an illustration an incident recently told by the commandant of the Fort Leavenworth Barracks, while attending the conference lately held in your office on prison discipline. He cited the case of an enlisted man who had been sentenced to two years for desertion. Arriving at the disciplinary barracks on March 8, 1916, he soon acknowledged the error of his former conduct, went into the disciplinary battalion, and was restored to duty within nine months; was assigned to the Sixty fourth Infantry at El Paso, became successively corporal, battalion sergeant major, and regimental sergeant major; landed in France March 15, 1918; anxious to get into the fighting, he began again, at his own request, at the bottom, as private in another unit; was made sergeant and fought at Chateau-Thierry in July, 1918; was sent to an officers' training camp, commissioned as second lieu-

tenant on October 1, 1918, was promoted to be first lieutenant on October 28, and ended on armistice day in command of Company L, One hundred and thirty-eighth Infantry. He wrote to the Commandant a few months ago, recounting his history, and ending thus: "There is only one question which I have to ask: Do you consider that I have made a success?" And yet the entire period of time which had elapsed since his original sentence was less than three years. In other words, though sentenced for a period of two years, he had been released from confinement, restored to duty, and traveled up through the grades of noncommissioned officer and had earned promotion through two grades of the commissioned officer, and occupied an honorable status in the Army, within a few months after the nominal period of his original sentence had expired.

This incident illustrates somewhat prematurely what I shall have later to say about the length of some of these apparently severe sentences. But the incident here illustrates what I am concerned to emphasize, viz., that military justice possesses in its indeterminate sentence and its probationary methods a system that is in advance of that of probably any State of the Union. I am given to believe that very few of our States yet possess a law authorizing this indeterminate sentence with no minimum. Our disciplinary barracks should indeed be thought of as a reform school, rather than a prison; it corresponds to the term "industrial school" as used in some States. And I need hardly point out that the dsciplinary barracks at Fort Leavenworth are totally distinct from the United States Penitentiary at Leavenworth. And I remember that you yourself recently stated informally at the above mentioned conference of officials that in your opinion the disciplinary barracks at Fort Leavenworth was the best penal institution in the United States. Without claiming any personal credit for its excellent administration, I must here, as some sort of proof of my own deep and long-standing interest in enlightened military justice, take the liberty of reminding you that the probationary system, as exemplified at the disciplinary barracks, was initiated in 1913, on my own personal recommendation, two years after my first appointment as Judge Advocate General; and that the act of March 4, 1915, which transformed the formerly so-called United States military prison at Fort Leavenworth into the United States disciplinary barracks, and organized the modern system of probationary detention for military offenders, was drafted at my instance. Space does not permit me to describe more fully its methods of vocational training and of psychological and psychiatric study and attention given to all prisoners there confined. I will only mention that Maj. King, now Lieut. Col. King, who was for a long time stationed at the Fort Leavenworth barracks, and whose genius I encouraged and supported in applying his practical methods,

is an officer of the Regular Army of the United States; and that the elaborate psychiatric attention given to military offenders sent there for detention is not paralleled, so far as I am aware, in any of the civilian penitentiaries now administered by the Federal Government, nor at most of the State penitentiaries.

This much ought in justice to be placed here on record, as information doubtless new to the intelligent American public, and yet calculated to assist in maintaining that public confidence in the military penal system to which it is justly entitled.

2. That the Military Criminal Code Itself is Not Modern and Enlightened, but is an Archaic Code Which Systematically Belongs to Medieval Times.

Of this statement I can only remark that it is baseless. Those who have ignorantly repeated the statement may be perhaps extenuated for this utterance to the American people of a gross slander, not only upon the War Department and the military system, but also upon the Congress which so conscientiously revised the military code in 1916. But though extenuated they can not be exonerated; for the entire story, so plain that anyone can read, is contained in the introductory six pages to the Manual for Courts-Martial published in November, 1916, and printed with everyone of the 250,000 copies that have been issued since that date. Those introductory pages state the entire history of the Articles of War, or Military Code; explain the revision of 1874, and enumerate the most fundamental of the changes introduced in the thorough revision of 1916. That introduction, however, does not state, and I will now add, that the revision of 1916 was pending in draft for four years before the Houses of Congress; that the draft was prepared in my office shortly after my appointment as Judge Advocate General; that it was founded on the most exhaustive consideration of the entire military code, as well as on a thorough comparison with the modern criminal law and its progressive tendencies; and that the hearings before the Military Affairs Committee (S. Rept. 229, 63d Cong., 2d sess., Feb. 6, 1914) showed the most conscientious discrimination of every detail; and that the testimony fills a volume of 146 pages.

The military criminal code of 1916 no more deserves the term "archaic" than the Revised Statutes of the United States under which the Federal courts since 1878 administered civil justice; and it is nearly 40 years later than the civil Revised Statutes. It represents the result of the most conscientious and constructive thought which could be brought to bear by the combined energies of the War Department and of the Congress of the United States in the year 1916.

That the experiences of this great war, with all its novel conditions, multiplying forty-fold the size of our military forces should

have revealed nothing in the way of new lessons for improvement, is not for a moment to be asserted. In the light of that experience, which subjected the military code to a tremendous and unprecedented test, I readily admit that certain improvements, limited in number, have been demonstrated to be worth while introducing, and I shall conclude this letter with a suggestion of those improvements. But the statement repeatedly made, and published far and wide, that the military code of 1916 is "an archaic code which systematically belongs to medieval times" and does not "belong to this modern enlightened period," but rather "to the England of 200 years ago, whose criminal code of that time was marked by civil harshness and brutality," is not only a cruel and dangerous slander, but is nothing less than a reflection upon the Congress which so conscientiously consummated that great task.

3. That a Soldier May Be Put on Trial by a Commanding Officer's Arbitrary Discretion, Without Any Preliminary Inquiry Into the Probability of the Charge.

Every system of penal justice has some method of insuring the exercise of caution by a responsible officer in scrutinizing an accusation before an accused is put to the necessity of defending himself by a formal trial. The traditional method inherited by us, in civilian justice, for serious offenses, is the presentment of a grand jury. This method has now proved cumbrous and ineffective; it has been abandoned in perhaps a majority of our States. The modern method of those States is a so-called information by the official State prosecutor, filed after such inquiry as he sees fit to make. This modern American method is the one to which France and other continental nations arrived some centuries ago, about the time when England developed the grand jury instead. This modern American method is also the one used in our courts-martial; it arrived in the Anglo-American military system some centuries ago, said to be by adoption from Scotland, which itself had adopted the French system; for the French were the great military nation of three centuries ago.

By this Anglo-American military system, some officer must file charges before any soldier can be tried. This protection is invariable. Often the judge advocate, as legal adviser, additionally scrutinizes a serious charge before it is filed. This is exactly the protection given by the State official prosecutor in the modern American method. How essential and thorough is this protection can only be appreciated by perusing the strict terms of the law and regulations. Paragraph 62 of the Manual of Courts-Martial reads:

> By the usage of the service all military charges should be formally preferred by—that is, authenticated by the signature of—a *commissioned* officer.

Paragraph 75 reads:

Submission of charges.—All charges for trial by court-martial will be prepared in triplicate, using the prescribed charge sheet as a first sheet and using such additional sheets of ordinary paper as are required. They will be accompanied—

(*a*) Except when trial is to be had by summary court, by a brief *statement of the substance of all material testimony expected from each material witness, both those for the prosecution and those for the defense, together with all available and necessary information* as to any other actual or probable testimony or evidence in the case; and

(*b*) In the case of a soldier, by properly authenticated evidence of convictions, if any, of an offense or offenses committed by him during his current enlistment and within one year next preceding the date of the alleged commission by him of any offenses set forth in the charges.

They will be forwarded by the officer preferring them to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs, and will by him and by each superior commander into whose hands they may come either be referred to a court-martial within his jurisdiction for trial, forwarded to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, or otherwise disposed of as circumstances may appear to require.

Paragraph 76 proceeds:

Investigation of charges.—If the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs or pertains decides to forward the charges to superior authority, he will, before so doing, *either carefully investigate them himself, or will cause an officer other than the officer preferring the charges to investigate them carefully and to report to him, orally or otherwise, the result of such investigation.* The officer investigating the charges will afford to the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him. (See par. 225 (*b*), p. 112.) If the accused desires to submit nothing, the indorsement will so state. In his indorsement forwarding the charges to superior authority the commanding officer will include: (*a*) The name of the officer who investigated the charges; (*b*) the opinion of both such officer and himself as to whether the several charges can be sustained; (*c*) the substance of such material statement, if any, as the accused may have voluntarily made in connection with the case during the investigation thereof; (*d*) a summary of the extenuating circumstances, if any, connected with the case; (*e*) his recommendation of action to be taken.

It will, therefore, be seen that the regulations require the strictest scrutiny by a responsible officer before any accused can be put on trial by a court-martial.

In one of the speeches uttered in Congress, occurs the following sentence:

The commanding officer may, *without any investigation of the circumstances*, order a man tried by court-martial; in the French Army such cases are not sent to trial until investigation can determine whether the man ought to be tried.

How is it possible for such an assertion to be made, in the face of the law and regulations represented in the quotation above from paragraph 76 of the manual? The safeguard contained in our manual of military justice stands on exactly the same footing with the safeguard contained in the modern method of the State prosecutor, and of the French system as cited by the critics.

But whatever may be the law and the regulations, doubtless it may be asserted that the regulations are not obeyed in spirit. This is, in fact, the precise assertion made in one of the congressional utterances and to that assertion I now come.

4. That Commanding Officers do thus put on Trial a Needlessly Large Number of Trivial Charges.

It has been asserted that commanding officers direct the filing of trivial charges in excessively large numbers. The precise language is: "It is not surprising, under the circumstances, that there are too many trivial cases sent to trial by court-martial."

Let us examine this assertion in the light of the facts of military justice during the past year as shown by the records.

The United States military forces raised up to November 11, 1918, numbered some 4,186,000; of these about 290,000 were already in service at the opening of the war; of whom 127,000 were in the Regular Army. Thus over 90 per cent were new men, fresh from civilian life. It must be taken for certain that their unfamiliarity with military discipline, and the novelty of its rigid restraints, would produce an unusual proportion of minor breaches of discipline. In other words, if commanding officers had been merely as strict and rigorous as with the Regular Army before the war, in pursuing minor breaches of discipline with court-martial charges, the ratio of trials would be at least as great, and presumably far greater, than before the war and the accession of the new army.

But the facts show, on the contrary, that commanding officers must have been far less strict and rigorous than before.

Let us take first the serious charges brought before general courts-martial. The printed report of the Judge Advocate General for the fiscal year 1918 shows that the total number of general court-martial trials in the Regular Army of 127,000 in the year ending June, 1917, was 6,200, or about one for every 20 men; while the total in the entire Army for the year ending June, 1918, was less than 12,000, or only one for every 200 men (the military forces on May 31 numbering 2,415,000 and the average for the year not being ascertainable with accuracy); and during the last six months of 1918 the total was 7,624, or at the rate per annum of only one for every 275 men (the military forces on November 11, 1918, numbering 4,185,000). As to special courts-martial, for the lesser offenses, the number in the Regular Army for the year ending June, 1917, was 2,970, or one for every 42 men, while for the year ending June, 1918, it was 14,700, or only one for every 165 men on the above annual basis. Moreover, as between the Regular Army and National Guard, and the National Army or new drafted men, the number of general courts-martial for the year ending June, 1918, was 10,363

for the former, and only 1,660 for the latter, or one for every 107 men in the Regular Army and National Guard (numbering on May 31, 1918, some 1,112,000, and composed in part of seasoned men), but only one in every 785 men for the National Army (numbering on May 31, 1918, some 1,303,000, and composed entirely of new drafted men); showing conclusively that commanding officers were more lenient and liberal with the men fresh from civilian life.

Turning now to the "trivial offenses" referred to in the above utterance, they are covered by the summary courts-martial, representing the extremely petty disciplinary penalties. The number of trials for the Regular Army, viz, 48,000 in 1917 (rising from an average of 38,000 for 10 years past, due to a proportionate increase in the size of the Regular Army), rose in the year ending June, 1918, to only 212,000, or slightly more than four times the number, although the entire military forces in the year ending June, 1918, rose to 2,415,000, or nineteen times the former size. In short, the petty disciplinary penalties dropped from a ratio of 1 to each 2.7 men to a ratio of 1 to each 11.4 men, or a decrease for 1918 *to less than one-quarter of that of 1917*.

There could be no more conclusive demonstration that commanding officers, though faced with a situation full of inducement to rigor in enforcing discipline among raw and untrained men, did in fact use remarkable consideration and self-restraint in not resorting to the instrumentalities of courts-martial. The facts show, therefore, precisely the opposite of the conditions asserted on the floor of Congress.

5. That the Court-Martial is Composed of and the Defense is Conducted by Men Not Acquainted with Military Law.

It would perhaps be sufficient in refuting this criticism to point out that the court-martial, though it nominally combines in itself the functions of judge and jury, and though this combination is under military conditions absolutely unavoidable, has nevertheless, as its essential and predominating function, that of a jury of fact. The court-martial listens to the testimony and makes findings of fact based upon the evidence. In our criminal common law it has always been regarded as a disadvantage that the jury should be technically skilled in the law; and it is a well-known practice of all experienced defenders in criminal cases to challenge and exclude from the jury members of the bar. Whether this belief is a sound one, I do not pretend to say; I only point out that the possession of legal knowledge by the jury is at least not considered vital in ordinary civil justice. In the practice of military justice, the legal knowledge necessary to insure an obedience to the requirements of law as to the composition of court, the procedure, and the definition of the offenses charged is expected to be supplied primarily by the commissioned

judge advocate, who acts as the judicial adviser of the reviewing authority. And the thorough scrutiny and review in the Office of the Judge Advocate General (a review, as already pointed out, more elaborate and thorough than is ordinarily supplied by any civil system) is especially calculated to insure an observance of all the rules of law. As the entire testimony is reported verbatim, including every point of law raised by objections of counsel, and as the application of all relevant rules of law must lie open to scrutiny on the face of the record, it is obvious that the court-martial's own lack of technical knowledge of law (in so far as it might exist in a given case) is amply made up, and more than made up, by the legal scrutiny supplied in the course of automatic appeal already described.

But in spite of these guaranties of legality for the court's action, the military system none the less takes all possible pains to insure an acquaintance with the law by the members of the tribunal. The entire military code, with an elaborate commentary and an appendix of forms, making a volume of 400 pages, and entitled "A Manual for Courts-Martial," is distributed in abundant quantities throughout the Army and forms a part of every military officer's education. Since 1916 more than 250,000 copies of this manual have been printed and distributed; in the month preceding the armistice in November, 1918, a new edition of 50,000 copies, revised to date, were being distributed throughout cantonments and camps in this country and to the divisions in the theater of war. Every officer of the Regular Army, during his four years in the Military Academy, must pass an examination in the course of military law. Every reserve officer who graduated from a training camp in 1917 and 1918 was equally obliged to study and pass an examination upon the Manual for Courts-Martial. Thus a fair familiarity with the substantive and the procedural portions of military law is established as a part of every officer's military training. Moreover, the regular duties of almost every officer in active service oblige him to take his turn frequently either as a member of the court or as a judge advocate or as counsel for the defense. Thus there are probably few officers in the service who have not had a greater or less practical experience in the use of the military code, and who have not thus familiarized themselves with the operation of the system which they have already studied in the Manual for Courts-Martial.

In the closing portion of this letter I am proposing an expedient which will supply an additional guaranty of technical legal knowledge in the composition of the court in cases especially likely to involve serious, difficult, or complex questions of law. Apart from such exceptional cases I am of the firm opinion that, so far as the members of the court-martial can properly need an acquaintance with the military code, they are in fact ordinarily equipped with enough of such knowledge; and that the efficacy of the guaranties for the ob-

servance of such rules of law does not depend, in the military system, upon the extent of the court-martial's legal knowledge (for they are essentially jurors of fact), but upon the legal knowledge of the commissioned (staff) judge advocate, who advises the reviewing authority, and of the commissioned (staff) judge advocates who scrutinize the record in the Office of the Judge Advocate General by way of automatic appeal.

6. That the Judge Advocate Combines Incongruously the Functions of Prosecutor, Judicial Adviser of the Court, and Defender of the Accused.

That the position of a judge advocate is a unique one may be conceded. A precise analogy does not exist in the civil system. This is because military conditions are not identical with civil conditions. But the assertion that the judge advocate combines incongruous functions which defeat each other or substantially impair his efficacy as a guardian of the military law must be emphatically denied.

The staff judge advocate is supposed to supply the professional and technical legal knowledge that is requisite to secure the observance of the law in all stages of the trial. Essentially he is a kind of superintendent of justice. From beginning to end his duty is to prevent the occurrence of illegalities. In this respect he aids the accused quite as much as he aids the prosecution; he has no more interest in securing a conviction than in securing an acquittal. He is, by his position, as impartial as is the Comptroller of the Tresaury, whose principal function is to see that no moneys are paid out except according to law, irrespective of the persons to whom they are to be paid. In practice, during the present war, a commissioned judge advocate (whose rank is never less than that of major or lieutenant colonel) is attached to the staff of each commander of a division or a department or other large organization having a separate zone of jurisdiction. After a court-martial trial is ended and when the record arrives in the hands of the commanding general as reviewing authority, the judge advocate's main function in military justice is exercised; he reviews the record, and advises the commanding general whether the trial has been conducted according to law in every respect; this includes the duty to advise whether the weight of evidence sustains the conviction, regardless of legal error. In this aspect he is essentially an appellate judge, and it is his duty to enforce the law as fully on behalf of the accused as on the behalf of the Government. The judge advocate thus attached to the division commander's staff has other duties of legal advice, corresponding to those of the Attorney General of the United States as legal adviser of the Government in all civil matters. But in military criminal justice his function is essentially judicial.

The misunderstanding which has led to the above criticism is doubtless based upon a confusion of the staff judge advocate with the *trial* judge advocate. The latter, who bears the same title, but who is not commissioned as a judge advocate, performs actually the duties of prosecuting attorney in an ordinary criminal case. This trial judge advocate is usually a junior officer and is detailed from any branch of the service (Infantry, Artillery, etc.), but not ordinarily from the Judge Advocate General's branch; i. e., he is not commissioned as a judge advocate, though he may have had legal experience in civil life. He is detailed anew for each separate court which may remain in session for some weeks or months. He therefore usually conducts a series of trials for a certain period in that division. But he is entirely distinct in personality from the staff judge advocate, who later acts as the judicial advisor of the reviewing authority. It may be confidently asserted that (except in a few special cases) no staff judge advocate attached as judicial advisor to the commanding general has acted during the present war as trial judge advocate (or prosecuting attorney) in a court-martial trial. The few exceptions to this statement occurred in special cases (such as the Houston riots and murders in 1917) where a staff judge advocate was specially detailed to conduct the prosecution, and where also the accused were aided by counsel consisting of specially detailed officers of high rank and legal experience or by civil counsel of their own choice, but in such case the judge advocate was brought in from a different department or division.

If this distinction be kept in mind, viz, the distinction between the staff judge advocate regularly attached as legal advisor to the staff of the reviewing authority, and the trial judge advocate specially detailed for the presecution of general court-martial trials in the various units within the division, it will be perceived that these two functions are in practice exercised by different persons. The trial judge advocate does indeed perform the duty of prosecuting attorney; he is supposed to conduct the prosecution, not indeed with the ruthless partisanship frequently to be observed in civil prosecuting attorneys, yet with the thoroughness suitable to a proper performance of his duties. But the staff judge advocate, in whose hands the record of the trial subsequently arrives and who reviews the record and advises the reviewing authority as to its legality, is a different personage and is in no way hampered by having formerly acted as prosecuting attorney in the same case. Such has been the universal practice in our Army during the present war. It is believed that this plain statement of facts ought to suffice to remove that natural misapprehension which seems to have been founded on a confusion of the terms.

The necessity of furnishing some legal advice by a trained military officer on many complex aspects of law and the impracticability of

allowing in the staff organization more than one officer for this purpose does indeed require the staff judge advocate occasionally to give legal advice in a composite capacity. Whether these few anomalous situations can be removed, with due regard to the necessities of military organization, is a problem that has often been discussed. On that point it is enough to say that the system which we now possess has substantially stood the test of time and experience. But so far as concerns the actual administration of military criminal justice, it ought to be plainly understood that military law does not tolerate the anomaly of expecting the same man to be both appellate judge and prosecutor, and that in the practice of the present war (as above pointed out) the trial judge advocate acting as prosecuting attorney in general courts-martial is a different person from the staff judge advocate regularly attached to the staff of the reviewing authority as a judicial officer and quasi appellate judge.

7. That Second Lieutenants, "Knowing Nothing of Law and Less than Nothing of Court-Martial Procedure," Are Assigned to the Defense of "Enlisted Men Charged With Capital or Other Most Serious Offenses."

In commenting on this criticism I may dispose of one part of it, viz, the statement that these officers "know nothing of law and less than nothing of court-martial procedure," by referring to what I have already stated, namely, that graduates of every training camp have studied and passed an examination upon the Manual for Courts-Martial, and that, therefore, the above criticism is upon its face groundless. The roster of Army officers during the present war contains probably thousands of young men who have been admitted to the bar and enjoyed the benefit of a longer or shorter experience as practitioners. While no direct proof by statistics can be adduced, it is common knowledge that the commanding generals in the assignment of counsel (where the accused does not make his own selection) have usually sought to utilize the services of those officers who have already had legal experience. It would be impracticable to propose that no officer shall be assigned to the defense of an accused unless he is already qualified as a civilian lawyer. Given the composition of the officers' roster, all that can be expected under the circumstances is that commanding generals shall do their utmost to select men of those qualifications, if available within the unit; and I do not for a moment doubt that such was the constant endeavor of the appointing authorities.

The other part of this criticism is that in capital or other most serious offenses the defending counsel has been officer of the lowest commissioned rank.

In so far as it seems to assert that the defending counsel in cases where a capital sentence *was actually imposed* have been second lieutenants, the complete facts could only be learned by a lengthy collation of all the records. But of the twenty-one records now available on file, in which a capital sentence was imposed, the defending counsel were as follows: In four cases a second lieutenant, in nine cases a first lieutenant, in six cases a captain (aided in three cases by a lieutenant), in one case by a chaplain, and in one case by a major.

In so far as the assertion refers, not to offenses in which a capital sentence was actually imposed, but in which the offense under the military code is *liable to be punished* with death, the assertion is to a large extent correct, although misleading. In time of peace all offenses (except one or two heinous ones, such as murder) are strictly limited by a small maximum period of imprisonment, which for strictly military offenses can not exceed 2½ years for ordinary desertion, and for civil offenses are graded according to the usual civil limitations, such as 10 years for burglary or manslaughter or robbery. But in time of war some military offenses may rise to a degree of danger vital to the safety of the Army, and therefore in time of war the death penalty is reserved in a number of military offenses as a possible maximum penalty. It is, I believe, a fact that the death penalty has been imposed by courts during this war in only ninety-six cases, of which approximately one-half were for military offenses; and that in all of these cases the death penalty for the military offenses was subsequently commuted or remitted. But it remains true that for the principal military offenses the death penalty is expressly authorized by the Articles of War to be imposed in time of war. In thousands of such offenses the penalty actually imposed (there being no minimum prescribed by the Articles of War) has been only a few months or perhaps a few years of imprisonment. In many of those cases it is true that the defense of the accused has been conducted by officers of the rank of second lieutenants. Just what proportion of cases this represents could not be stated without a complete and special examination of the 20,000 cases of general courts-martial arising since April 6, 1917.

But assuming that the proportion is a substantial one, I must point out that the situation existing in the camps and in the theatre of war presents almost insuperable obstacles to any other practice. The number of officers available for taking part in military trials is necessarily limited, for the active duties of military preparation and operation are obviously paramount. The main object of the Army is victory, not trials. Moreover, in the composition of the court it is plain that the prime requisite is to procure for the court itself the

most experienced officers of adequate rank as a guarantee for the wisdom of their judgment. Having regard for both these considerations, it therefore becomes a matter of great difficulty, if not impossibility, to secure for the conduct of the defense officers of equally high rank with the court. It is not to be denied that, if it were feasible in every case to assign for the defense an officer of equal rank with the senior officer sitting upon the court, this would be a desirable measure. But no one who has any acquaintance at all with conditions in the theatre of war could suppose for a moment that this is practicable. Even as it is, the organization of courts-martial makes already a serious drain on the efficiency of the strictly combatant work of the organization. The problem is a difficult one. It may be that some means can be devised for strengthening systematically the conduct of the defense in courts-martial in respect to the rank and experience of the officers so assigned. But that under the present war conditions it was feasible to obtain officers of higher rank in any considerable number must be denied.

Moreover, it is at this point that the military system offers a guarantee (not found in the civil system) of protection against the consequences of such inadequate defenses as may from time to time be found. The system of automatic appeals, already described, and the thorough scrutiny of the record given in the Office of the Judge Advocate General may be relied upon to supply that protection which in civil courts is usually given only by the skilled scrutiny of counsel for defense in the trial. Whatever point of law might have been made for accused's benefit by counsel's objection, and has failed to be made through his ignorance, can be and is habitually detected and enforced during this appellate scrutiny. The civil doctrine of utilizing only points raised by counsel's exceptions has no place in military appellate procedure. The officers of the Judge Advocate General's Office, as already shown above, scrutinizes the record and insure the observance of those fundamental rules of law which ordinarily are watched over by counsel for defense, and if such rules of law are found not to have been observed the record is disapproved for legal error, regardless of whether counsel for defense took notice of it or not. Virtually this appellate review performs over again the functions of counsel for the defense, and, not only in technical duty but in actual spirit, this appellate review seeks to make good those deficiencies of defense which may become obvious to the experienced scrutiny of the appellate officer. It is in this appellate review that I find the most satisfactory assurance that such deficiencies as may have from time to time occurred through the inexperience of officers assigned for the defense have been adequately cured.

8. THAT A PLEA OF GUILTY IS RECEIVED FROM AN ACCUSED ON A CHARGE FOR WHICH THE SENTENCE OF DEATH MAY BE IMPOSED.

I find it difficult to give a complete statement of facts in answer to this criticism, because a complete answer would require an examination of all the 20,000 records of general courts-martial since April 6, 1917, and such a complete examination can not be made in the time alloted me.

In what proportion of cases a plea of guilty has been received, and in what fraction of that proportion this offense has been one for which the death penalty might have been imposed, although not actually imposed, is impossible to say; but I firmly believe that the percentage is a small one. The common instincts of fairness and justice which form the motive for such a criticism are equally entertained by the same officers, taken recently from civilian life, who sit upon the courts as judges.

But if it be meant in the above assertion that when a plea of guilty has been received it has been customary or even frequent to *forego the presentation of evidence* by the prosecution, I can confidently assert that such cases have not occurred. The prosecution has seldom failed to adduce the requisite evidence; and whenever it has so failed, the reviewing authority has disapproved the record for such legal error. The Manual for Courts-Martial does not permit (except in the very minor cases) a plea of guilty to exempt a prosecutor from presenting his evidence. I quote from paragraph 154 of the Manual, page 72; it is obvious that if the injunctions of the Manual are observed (and the records show that they have been) a plea of guilty does not signify that the circumstances of the case were not thoroughly examined, with a view to ascertaining both the exact effect of the plea as well as the extenuating circumstances which might affect the sentence:

In cases where the punishment is discretionary, a full knowledge of the circumstances attending the offense is essential to the court in measuring the punishment and to the reviewing authority on the sentence. In cases where the punishment is mandatory, a full knowlegde of the attendant circumstances is necessary to the reviewing authority to enable him to comprehend the entire case and correctly judge whether the sentence should be approved or disapproved or clemency granted. *The court should therefore take evidence after a plea of guilty*, except when the specification is so descriptive as to disclose all the circumstances of mitigation or aggravation. When evidence is taken after a plea of "guilty," *the witnesses may be cross-examined, evidence may be produced to rebut their testimony, and the court may be addressed by the prosecution or defense on the merits of the evidence* and in extenuation of the offense or in mitigation of punishment. After a plea of guilty, *the accused will always be given an opportunity to offer evidence* in mitigation of the offense charged, if he desires to do so.

In each case tried by a general court-martial in which the accused enters a plea of guilty in whole or in part as to any charge or specification the president of the court shall explain to him as to that part:

First. The various elements which constitute the offense charged, as set forth in Chapter XVII, defining the punitive articles of war; and

Second. The maximum punishment which may be adjudged by the court for the offense to which he has pleaded guilty.

The accused will then be asked whether he fully understands that by pleading guilty to such a charge or specification he admits having committed all the elements of the crime or offense charged and that he may be punished as stated. If he replies in the affirmative, the plea of guilty will stand; otherwise a plea of not guilty will be entered. The explanation of the president and the reply of the accused thereto shall appear in the record. The same rule will apply in cases tried by special court-martial when the evidence heard is made of record.

When the accused pleads "guilty" and, without any evidence being introduced, makes a statement inconsistent with his plea, the statement and plea will be considered together, and if guilt is not conclusively admitted the *court will direct the entry of a plea of "not guilty" and proceed to try the case on the general issue thus made.* The most frequent instances of inconsistency are in cases involving a specific intent, as in desertion, larceny, etc. In such cases, where after a plea of guilty the accused makes a statement, the latter should be carefully scrutinized by the court, and if in the case of desertion in any part there is a statement that the accused had no intention of remaining away, that he expected to return when he had earned some money, or that when arrested he was on his way back to his organization, etc., or, in the case of larceny, that he intended to return the property alleged to have been stolen, etc., *the court should direct the entry of a plea of "not guilty,"* but the criminality of an intent once formed is not affected by a subsequent change of intent.

9. That Commanding Generals, As Reviewing Authorities, Send Back for Reconsideration Judgments of Acquittal.

This power undoubtedly does exist; and it is occasionally exercised. But only a brief explanation will be needed to show that it by no means signifies (as the criticism would imply) a subjection of the accused to injustice, by placing the arbitrary discretion of the commanding officer outside and above the guaranties of lawful procedure.

The reviewing authority, i. e., ordinarily the commanding general who has convened the court, represents essentially a first appellate stage. No sentence of court-martial can be carried into execution until it has been approved by the reviewing authority, i. e., neither acquittal nor conviction is effective until the reviewing authority has scrutinized the record and given it approval. The very object of this institution is to secure the due application of the law, and to surround the accused with an additional protection independent of the trial court. This power to approve or disapprove a finding is given great flexibility by the Articles of War; it includes the power to approve a finding of guilty of a lesser offense and the power to approve or disapprove the whole or any part of the sentence. In this respect the military appellate code differs from the usual civil code. Incidentally, this power to disapprove includes the power to disapprove a sentence of acquittal and to return the record for reconsideration by the court. But, intrinsically, nothing more is here

implied than the court is to reconvene and reconsider its judgment freely and independently. It is in no sense a measure which subjects the court-martial to the command of the reviewing authority in framing the tenor of its judgment upon such reconsideration; for the court is, under the law, entirely at liberty to adhere to its original decision.

That this power is a useful one, and that it is not in fact in any appreciable number of cases so exercised as to amount to an abuse of the commanding general's military prestige, will, I think, appear from the figures to be gathered from the records. In the first place, the power is exercised in the vast majority of cases solely for the purpose of making formal corrections of the record; for example, to enable the fact to be shown, if it was a fact, that a certain member of the court was present or was qualified or that a witness was sworn, or the like formal correction which will make the record of the trial correspond to the facts. In the second place, the exercise of the power in cases of an initial judgment of acquittal has been rare indeed; and in those few cases the trial court, far from exhibiting a supple obedience to the supposed hint of the commanding officer has, in the great majority of cases, adhered to its original judgment.

For the purpose of ascertaining the facts, an examination was recently made in my office of 1,000 cases (taking the first thousand as they came in the files) thus returned by reviewing authorities to trial courts for revision. Out of these 1,000 cases, the instances in which the original judgment was one of acquittal numbered 95. Of these 95 acquittals, 39 were returned only for formal corrections. Of the remaining 56, the court adhered to its original acquittal in 38 cases; and in only 18 cases was the judgment of acquittal revoked upon reconsideration and the accused found guilty of any offense. It seems plain, therefore, that in no appreciable number of cases has the exercise of this power resulted in a change of verdict upon reconsideration; and it would be going further than any natural presumption would permit us, if we were to infer that those changes involved substantial injustice to the accused. My own experience in the field can recall more than one case in which the verdict of acquittal was notoriously unsound, and in which the action of the commanding general in returning the case furnished a needed opportunity for doing full justice in the case.

But even though the power is a useful one, and even though the facts show that it is seldom exercised in cases permitting an inference that possible injustice was done, and even though the facts demonstrate that the power does not necessarily signify a subjection of the court-martial to the will of the commanding general, nevertheless it can not be denied that the practice differs radically from the traditions of civil justice. Whether the practice in civil justice is not too

scrupulous in favor of the accused, and whether the future may not rather witness some change of civil practice in the direction of the traditional military practice, I will not attempt to say. But the present military practice is one which on first impression is repugnant to the accustomed methods in civil trials, and for that reason I am ready to concede that the time has come to approximate the two methods. In the British system, that change was made some years before the onset of the present war. I am ready to recommend a similar change in our own practice. Although the power is a useful one, nevertheless, on the other hand, it does not appear that it is a necessary or fundamental one to the maintenance of military discipline; and in that situation the solution may well be to assimilate the practice as nearly as may be to the usual civil practice. This would mean that wherever the initial judgment is one of acquittal (either of the whole offense or of any particular charge), the reviewing authority should not have power to disapprove the finding of not guilty; and that, for the same reason, the reviewing authority should not have the power to revise a sentence upward.

10. That the Judgment of the Court is Kept Secret Until After the Action of the Reviewing Authority is Taken, even when the Initial Judgment is an Acquittal.

It is obvious that the rule upon which this criticism is founded is a natural consequence of the rule just commented upon, viz, that commanding generals as reviewing authorities may send back cases for reconsideration by the court even after a judgment of acquittal. If the initial judgment of the trial court is subject to change by the reviewing authority, it is obvious that its tenor should not be disclosed until after the reviewing authority has acted and has so notified the trial court. If, therefore, the above rule is to be changed it would follow that the present rule should also be changed, for the one depends naturally upon the other. In view of what has been said above as to the proposed alteration of the rule permitting the reviewing authority to correct and change a judgment of the trial court, I frankly admit that the corresponding change should be made in the present rule, and that upon a judgment of acquittal, which would therefore be final and not subject to change upon review, there is no reason why an immediate announcement should not be made, precisely as in the case of the verdict of an ordinary civil jury. I am pointing out that the rule here criticized is merely a corollary of the other rule, and that its maintenance under the system hitherto in force has therefore not been subject to criticism.

11. THAT THE SENTENCES IMPOSED BY COURTS-MARTIAL ARE AS A RULE EXCESSIVELY SEVERE.

In considering the severity of sentences (and this topic has been the main theme of the criticisms uttered on the floor of Congress) I must make my comments in the following order:

(*a*) The sentences as they have actually been imposed;

(*b*) The reasons for those sentences; and

(*c*) The measures now taken to give proper mitigation or remission of sentences.

(*a*) In considering the severity of sentences, it is, of course, necessary to examine separately the different offenses, since obviously the appropriate punishment varies widely for offenses of different moral culpability and different danger to military discipline. Space does not permit me here to set forth the facts for all of the offenses and sentences covered by the general courts-martial since April 6.

I handed to you on February 12, a complete table of data as to the length of sentences, for the period October, 1917, to September, 1918, covering the nine principal military offenses of desertion, absence without leave, sleeping on post, assaulting an officer or a noncommissioned officer, disobeying an officer or a noncommissioned officer, mutiny, and disobeying a general order or regulation. As this table is too lengthy for inclusion in this letter I shall content myself by taking the three most typical offenses: Desertion, absence without leave, and disobeying an officer.

(1) *Desertion.*—No one can approach the subject of sentences for desertion in time of war without keeping in mind the solemn and terrible warning recorded expressly for our benefit by Brig. Gen. Oakes, acting assistant provost marshal general for Illinois, as set forth in his report printed in the Report of the Provost Marshal General for the Civil War (Part II, p. 29). In impressive language he lays the following injunction upon us:

> Incalculable evil has resulted from the clemency of the Government toward deserters. By a *merciful severity* at the commencement of the war the mischief might have been nipped in the bud, and the crime of desertion could never have reached the gigantic proportions which it attained before the close of the conflict. The people were then ardent and enthusiastic in their loyalty, and would have cheerfully and cordially assented to any measures deemed necessary to the strength and integrity of the Army. They had heard of the "rules and articles of war," and were fully prepared to see * * * that deserters from the Army would be remorselessly arrested, tried by court-martial, and, if guilty, be forthwith *shot to death with musketry.*
>
> This was unquestionably the almost universal attitude of the public mind when hostilities began, and the just expectations of the people should not have been disappointed. Arrest, trial, and execution should have been the short, sharp, and decisive fate of the first deserters. * * * The Government was far behind the people in this matter, and so continued, until long and certain impunity had thrown such swarms of deserters and desperadoes into every State that it was then too late to avert the calamity. * * * I state these things so that, *if we have another war,*

*the Government may start right * * * put deserters to death*, enforce military law, strike hard blows at the outset, tone up the national mind at once to a realization that *war is war;* and be sure that such a policy will be indorsed and sustained by the *people.*

There are other suggestions to be made in respect to deserters, but the one I have already advanced—the nonindorsement of the penalties provided by the military code for the crime of desertion, especially at the beginning—is, beyond all question, the grand fundamental cause of the unparalleled increase of that crime, and of the inability of district provost marshals, with their whole force of special agents and detectives, to rid the country of deserters.

This solemn warning was naturally in our minds at the opening of the present war. But, in spite of its urgency, it was decided to exhibit our faith in the American people, and to place our trust in that loyalty and devotion to duty which we felt sure would characterize the vast majority of to-day's young American manhood. We believed that the "short, sharp, and decisive fate of the first deserters" should not be the extreme penalty as urged by Gen. Oakes. And the view was generally accepted in the Army that terms of imprisonment should be ordinarily deemed the adequate repressive measure for the few who might need it. And it is a fact that of the (approximately) 3,000 convictions for desertion, during the war, the sentence of death was imposed in only 24 cases, and in every such case it was commuted or remitted.

It must, therefore, be kept in mind at the outset that the refusal to adopt the policy of death sentences for desertion was *in itself a repudiation of the policy of extreme severity;* and that the practice of limiting desertion sentences to terms of imprisonment is in itself the adoption of a policy of leniency. Reproach for severity must deal with the fact that the policy adopted disregarded both the extreme penalty authorized by Congress and the warnings of the Civil War.

Turning, then, to the recorded facts, we find in the table that the total number of convictions for desertions for the year October, 1917–September, 1918, was 2,025; that the average sentence was 7.58 years; that nearly 24 per cent of these sentences were for less than 2 years; that 64 per cent were for less than 10 years; and that only 35.90 per cent were for a greater period than 10 years. The Article of War reads:

> Any person who deserts shall, if the offense be committed in time of war, suffer death, or such other punishment as the court-martial may direct.

It would seem, therefore, that in point of severity the result of courts-martial sentences for desertion can not be charged with erring on the side of severity.

You will notice that I do not here attempt to account for the justice of individual cases. Certain of the sentences for 25 years, or even for lesser periods, are open to criticism as excessively severe under the circumstances of the individual case. But it must be

kept in mind that these trials and sentences were found legally valid by the Judge Advocate General's Office; that the only issue of doubt that could arise concerns the quantum of the sentence; and that the scrutiny of the clemency section in the Military Justice Division of the office may be relied upon to detect cases of excessive severity before any excessive portion of such a sentence has been served. But the excessive severity of an individual sentence is not the question here; that question would call for the scrutiny of the particular case. The question here is of general conditions. What the above figures show in respect to general conditions, or the trend of conditions, is that the practice has been one of relatively moderate penalties instead of the severest one permissible under the law.

(2) *Absence without leave.*—Absence without leave is an offense which represents, in many instances, cases of actual desertion; but, owing to the movements of the military unit and thus the difficulty of obtaining the necessary technical proof, the actual deserter is frequently convicted of no more than an absence without leave. It is, therefore, plain that the offense of absence without leave may, upon its circumstances, merit an extremely severe penalty, equal to that of desertion. In time of war this offense may lawfully be punished by any penalty short of death; in time of peace a presidential order limits the maximum penalty to six months' confinement.

For the year ending September, 1918, the total convictions for this offense number 3,362; the average sentence was 1.59 years (or only three times the small maximum allowed in peace times); 11 per cent of the offenses received no penalty of imprisonment; 67 per cent received a sentence of less than two years imprisonment; and only 22 per cent received a penalty of more than two years in prison. When it is remembered, as above pointed out, that this offense is in many cases virtually the offense of an actual deserter, it will be seen that the number of the sentences over two years is not disproportionate to the probable ratio of cases individually calling for the higher penalties. An average sentence of 1.59 years for this offense, committed in time of war, can not be deemed an exhibition of severity, where in fact the act of Congress establishing the Articles of War leaves the court-martial absolutely untrammelled (short of the death sentence) in the penalty to be fixed to this offense.

(3) *Disobeying an officer.*—The offense of disobeying a superior officer is punishable, under the Articles of War, by "death or such other punishment as the court-martial may direct." The total number of convictions for this offense was 785; the average sentence was for 4.34 years; 6 per cent of offenses were punished by no imprisonment; 43.69 were punished by confinement of less than 2 years; and a trifle over 50 per cent were punished by some period greater than 2 years, there being one death sentence and 18 sentences for 25

years or more. Comparing the absolutely unlimited nature of the punishment permitted by the Articles of War to be imposed by the court-martial, and observing that 50 per cent of these sentences were for periods of under 2 years, it can not be that the tribunals appear to be seeking to exercise the maximum of severity allowable, but rather the contrary.

Moreover, in interpreting these sentences for the offense of disobedience of an officer, it is worth while to remind the civilian public that little or nothing turns upon the nature of the command itself which is disobeyed. Much has been made in public discussion of one or two instances in which the subject of command was apparently of trivial consequence; for example, a command to an enlisted man to give up some tobacco unlawfully in his possession, or a command to clean a gun. But in military life, obviously it is not the thing commanded that is material; it is the act of deliberate disobedience. Deliberate disobedience in one thing, if unchecked, means deliberate disobedience in any and all things. It was a condition of deliberate disobedience, in small and great things alike, which caused the Russian Army to melt away and transformed Russia into the home of Bolshevism. The military officer does not rule by violence, but by moral sway. He is able to organize his men upon the battlefield only because he can be confident that every command of his in matters great or small will result in instant and unquestioned obedience. Hence, an act of military disobedience is a symptom as alarming to the military commander as is the first incipient cancer cell to the surgeon—a warning that the knife must soon be applied. The War Department must invoke and expect the sympathy and support of an enlightened public in realizing that the offense of disobedience is to be ranked among the cardinal offenses of the soldier and requires the most rigid measures for its repression.

In the foregoing comments, it will be noticed that, since a charge of excessive severity implies the habitual resort to a maximum standard allowable under the law, the standard here to be taken must of necessity be the standard set by the Articles of War as adopted by the act of Congress. Judging by this standard, the practices of the court-martial, to any candid observer, must be vindicated from the charge of the habitual employment of severity; rather have they proceeded in a direction of a lenient use of their discretion.

I must freely admit that, in any discussion of the severity of sentences, notions of severity are so widely different that it will be hopeless to satisfy the standards of all varieties of critics. There exists to-day, in some minds apparently, a sentimentality towards offenders of every sort, which we could never expect to satisfy without a virtual undermining of the entire criminal law, whether military or civil. I received recently a letter, complaining of the "inhuman and outrageous punishments administered for trivial matters"; this ex-

pression being used of a court-martial sentence of ten years for conspiracy to rob. In the particular case, four soldiers, out on leave in a city adjacent to a military camp, assaulted with a pistol and violently beat a fellow soldier at midnight in a vacant lot, for the purpose of obtaining his money by force; and upon his raising an outcry they ran away, and his wounds were attended to by the military police. To apply the term "trivial" to this act of cowardly violence, and the term "inhuman" to the sentence of ten years, indicates such a singular standard of moral judgment that it would be impossible to reach an agreement, in estimating the severity of the sentence, with those who are willing to acknowledge such a standard of judgment. I am assuming, in what I have now to say, that the idea of severity is always to be interpreted in the light of a rational standard of moral judgment based upon the danger and heinousness of the offender's act in comparison with the sentence imposed.

I close this comment with a forceful quotation from a recent editorial in a leading daily journal:

When a soldier goes absent without leave, deserts his post of duty to see a dying father, he does so because his own personal desires are stronger than his sense of responsibility to his country. It may be a hard thing to give up seeing a dying father, but it is a harder thing to give up running away in the face of the enemy.

That is what military justice is about. The sole preoccupation of any army, wherever it is, is to train its men and keep them trained to obey the will of the commander under the most trying possible circumstances and serve the will of the Nation. If disobedience had been tolerated in the United States, our Army in Europe would not have captured the St. Mihiel salient nor fought six weeks in the Argonne.

An army to be successful in the field must, from the moment it begins to train at home, have absolute control of its discipline.

(*b*) The question may still be asked, however, whether even for these serious military offenses those sentences greater than, let us say, 5 or 10 years were necessary for the morale of the Army.

I must premise by pointing out first that these long sentences represent only a minute fraction in the mass of court-martial sentences, and, secondly, that the long periods of years named in those sentences were only maximum, and were therefore nominal only.

As to the first point, I call attention to the total number of sentences for a year, including trials in all grades of courts. These were approximately 240,000, of which the military offenses were at least 200,000 in round numbers. In these 200,000 sentences the vast majority, probably about 185,000, were imposed in summary courts, and those could not by law exceed three months. Another 10,000, approximately, were in special courts, and those could not have exceeded six months. Some 7,000 were in general courts, the only court authorized to impose a sentence of higher than six months. Now, for the year October 1, 1917, to September 30, 1918, the records of this office show that there were only 532 sentences for a period of 15 years or more; that is, less than three-tenths of 1 per cent of the over 200,000 trials for military offenses. And there were only about 2,200 sentences for five years or more, or a trifle more than 1

per cent of the 200,000 sentences for military offenses. If, therefore, anything is found to be wrong about this group of severe sentences, the wrongness can only affect a very small fractional corner in the area of military justice. There may be at this moment 532 cases of smallpox in the population of the metropolis of Manhattan, with more than 4,000,000 inhabitants; but this does not signify that there is any doubt as to the general healthy immunity of the metropolis against that plague.

The second point above mentioned is that these long periods of years named in the sentences were in effect nominal only. There being no minimum number of years, the offender may be released at any time by reduction or remission of sentence on recommendation of the clemency section of this office, where the offense is a purely military one. That this is not merely a possibility, but an actuality, will be seen from the fact later to be cited, that nearly 10 per cent of the 12,000 sentences for the last calendar year have in fact been selected for remission or mitigation, and that in those sentences an average of 90 per cent of the total periods has been cut off; for example, of the 2,035 sentences for desertion, some 577, averaging a sentence of 3.80 years, were selected for reduction, and this average was reduced, on the recommendation of my office, to an average of three months. In other words, the imposition of a 25-year sentence does not signify that 25 years of a sentence will be served; the experience of the year 1918 having shown that of the sentences selected for reduction only 10 per cent of the term is actually served. It is in this sense that I refer to these long-term figures for the maximum duration as merely nominal.

As an illustration conveniently at hand, let me take the four cases cited by Senator Chamberlain as illustrating excessive severity of court-martial sentences; he cited the case of a 25 years' sentence for absence without leave, another of 15 years for the same offense, and two cases of 10 years for sleeping on post. And yet the records of this office show that in two of these four cases the Judge Advocate General had advised that there was no legal objection to their restoration to duty, on December 10 and December 12, 1918, respectively, two weeks or more prior to the date of the Senator's speech in Congress; and the records of The Adjutant General's Office show these men actually restored to duty on December 23, 1918, one full week before the day when the Senator arose to complain of the severity of these cases; and all of this in the course of the normal operation of the system. These illustrations point to what I mean in saying that the long term named in the sentence is merely nominal, in that the offender may be, and in practice frequently is, restored to duty at an early period of a few months or more, totally regardless of the long period named in the sentence.

Why then (it may be asked) was it necessary or wise to name such long maximum terms in the sentence? The answer here must be

sought in the necessities of discipline while our Army was being raised, and in the just apprehensions of responsible officers over the fulfillment of their huge task. Half a million men were taken by draft in 1917, fresh from the associations of civil life; nearly another half million were entering by enlistment; and before three-quarters of the year 1918 had passed nearly four million men had been taken into the Army and were in the process of training. This training was conducted under circumstances of urgent haste never before known in our history—for the tide of battle was going against the allies, and the anxieties of the civilized world awaited breathlessly the arrival of our troops. To make good soldiers out of this huge and undisciplined mass, in an average period of three or four months for each contingent, was one of the most extraordinary feats ever accomplished in the history of military training; and it has testified in the highest degree to the adaptability and versatility of the American character. But it required urgent haste, and while it was going on the curtain was not raised upon the future, and the glorious results which now lie before us were still in the realm of doubt.

Our officers, charged with the duty of bringing these undisciplined men into immediate readiness for battle, were weighted with anxiety, day and night, at the possibilities of failure. The one imperative necessity was to inculcate the sentiment of obedience—obedience instant and absolute. For those few—and they were less than 15,000 out of 4,000,000—who committed serious military offenses, and thus showed themselves recalcitrant to the requirements of military discipline, some form of absolute moral compulsion was necessary. Whether that moral compulsion ought to take the shape of a sentence of 2 years or 10 years or 20 years was a matter about which it would have been dangerous to speculate. The situation called for an absolute certainty. The sentences must be such that they imported for any disobediently disposed soldier a penalty which would be absolutely compelling. When those officers selected occasionally (and the percentage of cases was extremely small) a long-term sentence which should have this imperative significance, they knew that this was only a maximum term and that there was no minimum, and that an early release would be easily earned by those who deserved it. And I can not bring myself to-day, nor, I think, can any man who will reflect on that situation, to question now the wisdom of their judgment. And I will even go so far as to say that probably none of these officers supposed for a moment that these long terms would ever actually be served. It was their business and duty to impose a compelling sense of discipline, and they chose those terms which, in their judgment, would do so. And it was not for them to undermine the effect of their discipline by announcing that none of these sentences need be served a moment longer than the exigency of the war required. They knew that, if the danger

should pass and if victory should crown their efforts, the authorities of the Army, and particularly the scrutiny of my office, would see to it that the sentences were appropriately cut down. And I think it can be safely asserted that, so far as there is anywhere an individual long-term sentence that could have been deemed excessive, the man who received that sentence has not yet served a single day of the excessive period. In other words, if an individual injustice was done in the length of period imposed, the injustice was never one which could not be corrected before it became in fact an injustice.

How thoroughly my office is now undertaking to apply this corrective in proper cases I will later mention. But I am concerned now, in these days of international safety and of national demobilization, to carry back in retrospect the minds of all reflecting citizens to the period of 1917, when the fate of the world trembled in the balance and the embryo armies of the United States were the hope of civilization for turning that balance in the direction of world rescue. The huge responsibility of preparing these armies almost over night lay upon these men who administered military discipline. How magnificently they discharged that task has been shown by the results of the battle field. I, in common with all other intelligent citizens, shared their anxieties, and I for one can not now remain silent while they are criticized for the conscientious exercise of that judgment in applying the necessary measures. Had they failed, they might have been put to the bar to account for themselves. But they succeeded, and in a manner which has commanded the admiration of the world's veteran soldiers. It is easy to be wise after the fact. But in the light of their superb success let no one now censoriously presume to disparage the soundness of their judgment nor the wisdom of the measures by which they achieved that success.

(*c*) I said above that I would conclude this part of my comment by mentioning the measures now practically under way for mitigating and remitting the sentences of courts-martial, in the light of the termination of hostilities and the restoration of the national safety.

On the 20th of January you approved a recommendation of mine, dated January 18, proposing the institution of a system of review for the purpose of equalizing punishment through recommendations for clemency. A board of three officers was designated by me in the Office of the Judge Advocate General on January 28. This board of officers, with a large number of assistants, is now examining the record of every sentence of courts-martial under which any soldier is now confined in any prison in the United States. The recommendations of this board will go so far as to remit the entire portion not yet served upon a sentence of confinement or to reduce it to such amount as seems suitable to the present situation in view of the necessities of military discipline. It is expected that at least 100 cases a day will be passed upon by this board. The completion of the work of this board, which can not require more than a few months

at the most, will signalize a complete readjustment of all sentences in a manner appropriate to the termination of hostilities and the resumption of peace-time requirements for military discipline. It is certain that every sentence that might now be deemed in excess of the necessary period will be duly reviewed and that no soldier now in confinement will serve any period in excess of that just amount, so far as human powers of judgment are equal to this task.

12. That the Sentences Imposed by Courts-Martial are Variable for the Same Offense.

When we come to the question of variability of sentences, we reach a subject which has been the fertile field for complaint and criticism in civil courts for a century past. It is notorious that the independent judgment of different courts and of different juries seems to be characterized by the most erratic and whimsical variety. Such has been the constant burden of complaint in civil justice, and it can hardly be hoped that military justice could escape a similar complaint in some degree. On the other hand, it must always be remembered that here the individual circumstances vary so widely that a variation of sentences is perfectly natural, and that the mere variation of figures in itself signifies very little where the individual circumstances remain totally unknown to the critic. Nevertheless a variability of sentences for the same offense is something which naturally excites attention and caution; and it should be the object of appellate authorities to equalize the penalties for the same offense where no obvious reason for substantial difference is found. How far the revisory authority of the Judge Advocate General and the clemency powers of the Secretary of War have been effectual to secure such equalization will be noted later in this letter. At the present the inquiry of fact is whether there has been such variability and at what points it has taken place.

The table above referred to, and already handed to you, summarizes for the nine principal military offenses the variance of the sentences, first by months of the year covered, and secondly by jurisdictional areas from which the court-martial records come up for revision. In summary of these variances it is here to be noted that such variances obviously exist; that these variances are not in themselves any more striking than those that are found in the sentences of civil courts, as already shown in the other table submitted to you; that in seeking the possible source of these variances it appears very strikingly that there has been a slight but appreciable increase in the number of higher-period sentences as we come down to the later months of the war; and that, so far as jurisdictional areas are concerned, there have been notable variances which seem in some cases to localize the higher-period sentences for certain offenses in certain specific areas.

As illustrating the foregoing inferences it will be sufficient here to take the single offense of *desertion*. Examining it by *months* it will be noticed that the long-term sentences of 10 to 15 years, and of 15

to 25 years, and over 25 years increased slightly in their ratio to the whole of the sentences for the month as we approach the later months of the year under examination. For example, for the months of October, 1917, to February, 1918, there were no sentences over 25 years, although the number of convictions increased from 55 to 196 (the increase, of course, being due to the much greater ratio in the increase of armed forces). But during the months of April to July, with approximately the same number of convictions, averaging 225, the number of sentences for over 25 years increased from 4 to 9, to 15, and finally to 33. Apparently, therefore, some conditions in the Army changed as the months advanced so as to induce this variance in the direction of higher-period sentences. Just what those conditions were can not even be the subject of speculation without a very careful inquiry; merely the fact is here pointed out.

Again, turning to the *jurisdictional areas*, we find that the Central Department shows about 9 per cent of sentences for over 10 years, while the Eastern Department shows only 3 per cent; that the Twenty-eighth Division, having 21 convictions, imposed no sentences in excess of 10 years, while the Eightieth Division, with exactly the same number of convictions, imposed 14 sentences greater than 10 years.

As further indicating this variance by jurisdictional areas, a glance at the same table under the offense of absence without leave, shows that, in the Twenty-eighth Division, which exhibited the above leniency for desertion, the offense of absence without leave was given a sentence of under 2 years for 127 out of 140 convictions; while the Eightieth Division, which had shown a large majority of long-term sentences for desertion was, on the other hand, lenient for the offense of absence without leave, imposing 16 sentences of under 2 years, out of 20 convictions. Comparing again the Thirty-sixth and Thirty-ninth Divisions, with substantially the same number of convictions, viz, about 175, one finds that the former imposed about 20 sentences of above 10 years, while the other imposed 101 sentences above 10 years. This same Thirty-ninth Division had also used a majority of higher period sentences for desertion, whereas the Thirty-sixth Division showed for desertion a record that averaged with the other divisions.

It will be seen, therefore, that in many, if not in most cases, the extreme variances may be traced to difference of practice in the different jurisdictional areas. Just what conditions existed which would justify in the individual cases, or in the general trend of cases, this variance between divisions, can hardly be the subject even of hypothesis. But it must be obvious to any candid observer that there do exist wide differences of conditions, not only in the racial and educational make-up of the different camps, but also in the morale and necessities of discipline prevailing in different camps. It is well known that the sentences of civil courts for civil offenses vary widely in the different States. For example, in 1910 (Census

Report, 1910, "Prisoners and Juvenile Delinquents," p. 50), the percentage of sentences of 10 years or over was 9.7 in the East South Central States, but was only 0.1 in the New England States; in Mississippi, it was 22.51, but in California it was only 2.3. This illustration is mentioned merely to suggest that whenever one discovers that variances in sentences have a certain relation to variances in camps or divisions, the subject becomes at once too complex for hasty judgment.

Apart from what is now being done in my office by way of the equalization of sentences by commutation in the way of clemency, I am only concerned here to point out the facts as they are found in the records relative to the action of the courts-martial themselves; and to note that such variances (apart from peculiar individual cases) as are revealed in any noticeable amount, seem to be due most largely to differences of conditions in the different camps, divisions, and other jurisdictional areas; and the greatest caution must be exercised before passing judgment upon such variances as inequitable, without being fully familiar with the conditions operating in those places.

Moreover, I must utter a further caution against the popular presumption that a difference in sentences of different individuals for the same offense signifies necessarily any inequity. The individual circumstances differ so widely that the injustice would consist, not in the variability, but in the rigid identity of the same sentence for the same offense in every individual case. This very matter of variation in sentences is one of the triumphs of modern criminal law. One hundred years ago virtually every criminal code of the civilized world was marked by a rigid fixation of penalties for each variety of offense. It was regarded as one of the great objects of criminal reform in that era to introduce variability of the sentence and adapt it to the circumstances of the individual case. One of the first criminal codes to introduce this reform was that of the State of Louisiana, drafted just a century ago by the great Edward Livingston, recognized as the most eminent jurist of his day; this code received the approval of the jurists of the world; and one of its most remarkable features was its recognition of the variability of sentences for varying individual circumstances. Ever since that day all progress in criminal codes has included this element in an increasing degree. The particular virtue claimed and proved for the indeterminate sentence, which has now been adopted in probably three-quarters of the States of our Union, is that it gives full play for the adaptation of the sentence to the individual case. We must, therefore, always recall that the variability permitted by law is in itself a powerful feature tending to the apportionment of justice according to the circumstances of each case.

The one complementary element necessary in a criminal code in guarding against too great a variability in the action of different courts is the power of ultimate readjustment by some central tribunal.

In the language of one of the very Senators who has criticised some of these sentences:

> The sure cure for it all is to have some sort of a tribunal, appellate or supervisory, that shall have the power to formulate rules and equalize these unjust sentences. * * *

Precisely this power of recommendation is now exercised, and long has been, by the Judge Advocate General's Office, in its clemency section. The explanation of this activity brings me to the next point of criticism.

13. THAT THE JUDGE ADVOCATE GENERAL'S OFFICE EITHER PARTAKES IN THE ATTITUDE OF SEVERITY OR MAKES NO ATTEMPT TO CHECK IT BY REVISORY ACTION.

The distinct implication running through the critical remarks above quoted is that there exists no central authority that can check, equalize, or correct such severity or variability as may be found to merit such action, and that the Judge Advocate General's Office, charged with the duty of revising these court-martial records, either acquiesces in the result of the court-martial sentences as approved by the reviewing authority or makes no attempt to check any excesses by revisory action.

It is, therefore, necessary to emphasize that the Judge Advocate General's Office not only scrutinizes the court-martial records for the purpose of discovering errors of law and procedure, but also, in the clemency section of the Military Justice Division, occupies itself exclusively with the scrutiny of records for the purpose of recommending for remission or mitigation those sentences which are open to question as to severity or inequality. This power has been exercised habitually ever since our entrance into the war, as well as before that date.

Inquiring into the results to see what the facts show the question presents itself: To what extent has the Judge Advocate General's Office called for a reduction of sentences by a recommendation of clemency to the Secretary of War? And I note in passing that in no instance, so far as I am informed, has such a recommendation of clemency failed to be approved and given effect by yourself.

(*a*) The extent of such recommendations as to the *number* of sentences is shown in the following summary, covering the clemency recommendations for the year 1918, as applied to the sentences from October 1, 1917, to September 30, 1918, for the nine principal military offenses:

Total number of such sentences imposed, 7,624; total number of such sentences selected by the Judge Advocate General's Office for reduction, 947; percentage of selected sentences on all sentences, 12.42. I see no reason to doubt that this 12½ per cent is ample enough to cover all the individual cases in which an excessive severity would have been apparent on the face of the record.

The table as placed in your hands shows the reduction in its relation to the sentences of different lengths. The table shows that the largest percentage of reduction occurred in the sentences of medium

length, and that the smallest percentages of reduction occurred in the sentences of shortest and of longest periods. This result is perfectly natural and appropriate. The shortest sentences are those in which there would be the least call for reduction by clemency on the ground of excessive severity. The longest sentences are those in which the reduction on the ground of excessive severity would presumably not bring them to an extremely low period and, therefore, in which the time for recommending such reduction had presumably not arrived.

(*b*) How much reduction did this action effect in the *total length of all the sentences* acted upon? This will afford some gauge of the thoroughness of the action in the nature of clemency. A table already in your hands shows the number of sentences recommended for reduction, the total years of the original sentences, the total years reduced on recommendation of the Judge Advocate General's Office, and the net years of sentence as actually served; and the figures are given separately for the nine principal military offenses as well as for the total of all offenses, October 1, 1917, to September 30, 1918.

Referring to the table for details as to the specific offenses, I will point out here merely that for all offenses, military and civil, the total reduction effected was a reduction of 3,876 years out of an original period of 4,331 years, or a reduction of 89½ per cent. In other words, action of this office, in effecting reductions in the 1,147 sentences selected on their merits for reduction, cut them down to 10.50 per cent of their original amount. Presenting the same result in another form, the average original sentence, of these 1,147 sentences, was for a period of 3.78 years (or nearly 4 years), and the average sentence served as reduced was only 0.40 of one year, or less than 5 months.

These figures as to reduction effected in the length of the sentences, demonstrate that the action of this office was a radical one, and must have served to eliminate any excessive severity in those sentences. That the sentences selected for such recommendations of clemency included *all* of the sentences meriting the term "severe," neither I nor anyone else would be in a position either to affirm or deny without an examination of every record.

How extensive is the scope of reduction now undertaken for all sentences, by the special clemency board recently appointed at your instance, has already been told.

14. That the Action Taken in the Judge Advocate General's Office is Ineffectual to Enforce Military Law and Procedure, Because its Rulings Do Not Have the Force of a Supreme Court Mandate, But Are Only Recommendatory, and Are Either Ignored by the Division Commanders or Vetoed by the Chief of Staff.

This brings me to the question which has formed the principal theme of recent discussion in Congress; and I must divide my comments under three heads, covering each one as concisely as accuracy will permit: (*a*) the question of simple fact, i. e., what actually is the

effect of the Judge Advocate General's action; (*b*) the question of legal theory, i. e., what is the extent of his legal powers under existing law; and (*c*) what use has recently been made of this question of legal theory by certain parties in disparaging the administration of military justice by the War Department.

(*a*) *The simple question of fact.*—The foregoing exposition of the principles of military law and procedure, as enforced through the appellate system culminating in the advisory action of the Judge Advocate General's Office, is vain and meaningless to some of the critics of our military system. I find it repeatedly asserted and implied that the commanding officer of the division or department—in technical language the reviewing authority—is not obliged to follow and does not, in fact, follow these recommendations. "Court-martial sentences found, by the reviewing authorities, to be null and void for want of jurisdiction," it is stated, "have been allowed to stand." "The military commander is not obliged either to ask for legal advice or to follow it when he has asked for it, and it has been given to him by the responsible law officers of the Army." "Courts-martial should be required to accept the interpretation of the law by a responsible law officer."

The records of courts-martial come to the Judge Advocate General to "revise," and what legal effect this "revision" ought to have in theory is a mooted question of law and policy on which I shall later comment; suffice it here to say that a difference of view exists, and that the judgment expressed by the Judge Advocate General in his appellate capacity is customarily phrased in terms of a recommendation to the commander in the field. But this question, after all, like many questions of fundamental principles, may become practically irrelevant in the light of the facts. The assertion made in the remarks above quoted is an assertion of fact, viz, that the commanding officer *does not* follow the legal advice which is given him and does not accept the rulings of the responsible law officer.

On the question of fact let the facts themselves answer.

The cases fall necessarily into two groups. One class of cases, coming to the Judge Advocate General for revision under United States Revised Statutes, section 1199, the thirty-eighth Article of War, and General Order No. 7, January, 1918, require and receive no other revision or approval than that given by the Judge Advocate General. The other class of cases includes sentences of death and of dismissal of officers, which, under the forty-eighth article of war, require confirmation by the President, as well as certain other cases in which error of law has been found but the execution of the sentence has not been suspended by the reviewing authority. The former class of records go directly back from the Judge Advocate General to the reviewing authority in the field; the latter class of cases go from the Judge Advocate General through The Adjutant General and the Chief of Staff to the Secretary of War, and sometimes to the Presi-

dent. The question of fact is, therefore, in what proportion of cases does purely military authority fail to give effect to these revisory rulings of the Judge Advocate General?

The results in both classes of cases are shown in the following table:

Effect of action of Judge Advocate General's Office Apr. 6, 1917–Jan. 1, 1919.

Cases recommended for modification or disapproval on legal grounds.[1]	Number of cases.	Recommendations given effect.		Recommendations not given effect.	
		Number.	Per cent.	Number.	Per cent.
To reviewing authority	212	205	96.7	7	3.3
To Secretary of War	279	273	97.8	6	2.2
Total	491	478	97.4	13	2.6

[1] Does not include a few cases in which the Judge Advocate General's Office recommended changes in the place of confinement.

It thus appears that out of a total for the period covered of 491 cases recommended by the Judge Advocate General for disapproval on legal grounds, there were only 13 cases in which the Judge Advocate General's ruling was not followed; of these cases, 7 were not followed by the reviewing authority in the field, and 6 were not followed in the Secretary of War's office.

In the light of these facts, I think I am justified in asserting that the records disclose no foundation for the assertion contained in the above-quoted remarks. It is *not* a fact that the military commander or that any military authority proceeds to follow out the dictates of his own discretion regardless "of the interpretation of the law by a responsible law officer," nor that he fails to follow the legal advice "When he has asked for it and it has been given to him by the responsible law officers of the Army." Whatever may be the legal theory of the function now placed by statute in the Judge Advocate General as the law officer or appellate tribunal for military justice in the Army, that theory becomes virtually immaterial in the light of the facts during the period of the war. The state of things supposed by critics to exist, simply does not exist. Virtually the recommendations of the Judge Advocate General are given practical effect in the same manner as the trial courts in civil justice give effect to the mandate of the supreme court of the State.

(*b*) *The question of legal theory.*—The question of legal theory, stated concisely, is this: Is the Judge Advocate General's ruling mandatory, like that of a supreme appellate court, with the effect of compelling the reversal or correction of a court-martial judgment founded upon legal error? Or is it only recommendatory, in that the commanding general or the President, as the case may be, is not bound implicitly to follow and give effect to the ruling?

The question was first presented to this office, during the present war, in October, 1917, in the now celebrated case of the "Texas mutineers" (C. M. No. 106,663, tried at Fort Bliss, Tex., in September, 1917). In this case certain sergeants, having been ordered under

arrest by a young officer, for a very minor offense, were afterwards, while still under arrest, directed to drill; but, as the Army Regulations, properly construed, do not authorize noncommissioned officers to be required to attend drill formations while under arrest, the sergeants declined to drill as ordered; for this disobedience they were found guilty of mutiny, and sentenced to dishonorable discharge and imprisonment for terms of between 10 and 25 years.

Now it may be at once and unreservedly admitted that this was a genuine case of injustice, and that the injustice was due to an overstrict attitude of military officers toward discipline; for it is conceded by all that the young officer who gave the order to drill was both tactless and unjustified in his conduct, and it is conceded that the commanding officer who reviewed and approved the sentence was a Regular Army officer of long experience, who failed to appreciate the justice of the situation. That this case illustrates the occasional possibility of the military spirit of discipline overshadowing the sense of law and justice is plain enough. But that it indicates any general condition can not for a moment be asserted. Moreover, this very case serves also to illustrate the essentially law-enforcing spirit which dominates in the office of the Judge Advocate General. The impropriety and illegality of the sentence in this case was immediately recognized when the record arrived in the office for review. An opinion was prepared pointing out the irregularity and injustice, and directing that the findings be set aside. But the legality of such a direction was questioned in the face of a ruling by the Attorney General of the United States, many years ago, that a sentence of court-martial, once executed, can not be set aside even by the President himself. This raised the general question of the authority of the Judge Advocate General not merely to recommend for clemency (which would not have been an adequate redress for the convicted men in this case), but to direct the setting aside of the findings, in a judgment of a court-martial, for legal error, where the sentence had been already executed (namely, in this case, the sentence of dishonorable discharge).

The Secretary of War having sustained the doubt as to the authority of the Judge Advocate General to take such radical action, clemency was extended by the President, releasing the men from confinement and restoring them to duty, within about three months from the date of their conviction. At the same time a new measure was adopted by the Secretary of War, in the shape of General Order No. 7, W. D., 1918, taking effect February 1, 1918, which prevented the recurrence of such instances, by directing that the commanding general, upon confirming a sentence of death or officer's dismissal or dishonorable discharge, should suspend the execution of the sentence, pending a review of the case in the office of the Judge Advocate General. Thus immediate measures were taken, to go as far as could be gone under the law as conceded on all hands, to prevent the recurrence of the situation presented in the Texas mutiny case.

It would be out of place here to set forth at length the arguments pro and con upon this question of legal theory. The basic statute defining the powers of the Judge Advocate General in respect to courts-martial judgments dates from 1862, and provides (U. S. Revised Statutes, section 1199) that "the Judge Advocate General shall receive, *revise*, and cause to be recorded the proceedings of all courts-martial," etc. This word "revise" was construed by the senior officer on duty under me, when dealing with the Texas mutineers' case (above cited), to signify a complete appellate authority empowering the Judge Advocate General to correct and if appropriate to set aside, reverse, and annul a court-martial judgment which involved some legal error. But this construction of the statute could not be accepted by me. One reason was that for 55 years my predecessors in office, beginning with Judge Holt, in Lincoln's administration, had failed to advance any such construction enlarging their powers, and that a decision of a Federal court in 1882 had expressly repudiated the propriety of such construction. A second reason was that the assumption of such a power by this office under that statute would equally operate to control not only commanding generals of a division or department but also the President, as Commander in Chief, in those cases where he has the reviewing authority under the 48th article of war, and thus would render the Judge Advocate General virtually a supreme military tribunal independent of the President himself; the ultimate control of the discipline of the Army would become vested in the Judge Advocate General. A third reason was that even the President himself does not under the existing law possess such a power to set aside and annul a sentence of a court-martial, when once it has been executed; the absence of such a power in the President having been constantly maintained in a long series of opinions by the Attorneys General of the United States, beginning with Caleb Cushing in 1854. (6 Op. A. G. 514; 10 Op. A. G. 66; 15 Op. A. G. 290; 17 Op. A. G. 303.) It would thus be anomalous and extraordinary to suppose that the Congress had intended to vest the Judge Advocate General with a supreme authority which they had not seen fit to grant to the President himself; the President being the "natural and proper depository of appellate judicial power" for the Army, as pointed out by William Wirt, when Attorney General in 1818. Such was the issue of legal theory, and such were the controlling reasons forcing me to refuse to accept the construction of Revised Statutes, section 1199, which would vest that extraordinary power in my office.

But the lack of that power, lodged somewhere, and most preferably in the President himself, was certainly to be regretted. The General Order No. 7, effective February 1, 1918, and drafted at my instance and in my office in December, 1917, virtually prevented the recurrence of injustice in most cases by requiring the reviewing authority to suspend execution of the sentence pending the review in

my office. But for cases that had occurred prior to that date, and possibly for other occasional cases, a more radical remedy was needed, for example, in the above-cited case of the Texas mutineers, for whom the record of dishonorable discharge remained perforce unrevoked, although they had been already released from confinement and restored to duty.

I was ready and anxious to see the existing law so amended as to remedy this defect, by a grant of power from Congress to the President. Far from opposing such remedy, I took prompt measures to secure it. My only negative attitude was to oppose the assumption of that power by myself, through mere construction, sudden and revolutionary, of a statute never before deemed to bear such interpretation.

This attitude on my part has been subjected to the most unwarrantable distortion in recent discussion, and I am therefore obliged now to place before you the facts that (as I hope) furnish my vindication.

(*c*) *The use made of the foregoing controversy.*—It has been publicly alleged, first, that I was opposed to the correction of this admitted defect in existing law; and, secondly, that I carried my opposition so far as to secure the revocation of the appointment of my senior officer as acting Judge Advocate General, because of his championship of the view which I opposed.

On the first point, a brief reference to documents long in print will supply the instant refutation. In January, 1918, you yourself, having agreed with my construction of the statute, and having concurred in the view that the situation required remedy, sent a letter dated January 19 to the chairmen of both the Senate and House Military Affairs Committees, transmitting a bill, S. 3692, H. R. 9164 (drafted in my office), amending the section of the Revised Statutes in question so as to enable the President, advised by the Judge Advocate General, to reverse or modify findings and sentences of courts-martial; and in general to cure the existing defect of power. On February 5, 1918, I testified fully in support of the bill, at a hearing before the House Committee on Military Affairs (printed as "Hearings before the Committee on Military Affairs on H. R. 9164," February 4, 5, 22, 1918). During the year that has elapsed since the presentation of that bill, neither the Senate nor the House has seen fit to take action upon it. So far as I am informed, it was never even reported out by either committee. I think, therefore, that in mere justice to myself, I am entitled to point out that the responsibility for any injustices that may have occurred in the administration of military justice since February, 1918, and the inability to correct injustices prior to that date, due to the defect of appellate powers here in question, can not be laid at the door of the Judge Advocate General.

In January of the present year, however, was introduced a new bill, both in Senate and House, S. 5320 and H. R. 14883 (Cong. Rec.,

p. 1988, Jan. 23), which again proposed to correct the defect already described, but this time by vesting in the Judge Advocate General (sec. 8) this power to disapprove the whole or any part of a finding or sentence of a court-martial. The expedient proposed in this measure, viz, the grant of power to the Judge Advocate General (not the President), is identical with the construction of Revised Statutes, section 1199, urged by the senior officer on duty in my office in November, 1917, more than a year before. And speeches were now heard on the floor of Congress lamenting the errors due to the defective military law, urging the passage of this bill, and reflecting on the negligence of the War Department in failing to administer complete military justice. I am here concerned only with pointing out, in respect to this particular and conceded defect, that the responsibility surely does not lie with either yourself or myself; for the passage of the earlier bill, S. 3692 and H. R. 9164, introduced just one year before, in January, 1918, would have rendered needless either the bill or the discussion of January, 1919.

As to the second point: I said above that the bill of January, 1919, proposed to lodge this appellate power not in the President but in the Judge Advocate General, exactly as maintained by the senior officer above referred to, in November, 1917, and as repudiated by me at that time. This officer in a letter dated February 17, 1919 (Cong. Rec., p. 3982, Feb. 19), has now attempted to place both you and me in the position not only of having opposed his efforts to correct the defect of the law but even of concurring to cause him to be "relieved of any duties in connection with the administration of military justice," because of his efforts to reform the law.

It is unpleasant to have to defend oneself against such a charge, because to set forth the facts as they were must involve the revelation of a discreditable course of conduct in an officer whose abilities had heretofore possessed my entire admiration and personal confidence. Summarizing the facts as they appear of record, they are these: In October, 1917, I was dividing my time between the duties of Judge Advocate General and Provost Marshal General, usually spending the evenings and often other parts of the day at the former office. On November 3, 1917, the officer in question forwarded to me a memorandum formally superscribed: "Memorandum for Gen. Crowder," and containing the following passage.

> I am at times considerably embarrassed, and besides the transaction of public business is I think somewhat impeded and confused, by the fact that it is not known to the service at large that you are not conducting the affairs of this office as well as those of the Provost Marshal General; the public conception being that you are, as you legally are, the head of both offices, as in fact you are not. * * * I ought to be designated in orders by the Secretary of War as Acting Judge Advocate General during your practical detachment from the office.

The reference here was to Revised Statutes, section 1132, which authorizes the President "during the absence of the chief of any

military bureau," to empower "some officer of the department or corps whose chief is absent to take charge thereof." The letter continued:

I believe that the conception which the service has of your relation to both offices has succeeded in minimizing the importance of each office, and that this has resulted already in considerable disadvantage to yourself, and has resulted in no advantage to me. I submit this matter to you wholly disinterestedly personally but with the absolute conviction that the order ought to issue. If the suggestion should be agreeable to you, I should ask you to join in the memorandum to the Secretary of War asking its accomplishment.

I am expressing it mildly when I say that the conviction thus communicated was a total surprise to myself. Its formal manner of transmission, when a personal visit from an adjacent room would have sufficed to open the matter frankly and naturally, gave me the impression of being virtually charged with a neglect of duty which others had observed but of which I was myself totally unaware, and showed me that I was hardly in a position to pass an unbiased judgment upon the propriety of my being relieved from titular charge of the Office of the Judge Advocate General pursuant to the statute. I therefore resolved, without personal protest or even argument, to leave the matter entirely in the hands of yourself, the natural judge of the proprieties. My reply of November 4, read:

MY DEAR GEN. ANSELL: It will be entirely agreeable to me to have you take up, directly, and in your own way, with the Secretary of War, the subject matter of your letter of yesterday—

and closed with a simple sentence disclaiming knowledge of any supposed embarrassment to public business as alluded to. No further communication passed between us nor between the officer in question and the Secretary of War; for it will be noted that both his original proposal and my reply were expressly directed to his taking up the matter "*directly* with the Secretary of War." But on November 6, two days later, the officer presented in person to the Acting Chief of Staff a memorandum containing a draft order for his own designation, under Revised Statutes, section 1132, as Acting Judge Advocate General, and asking that the order "be published immediately." This memorandum began: "Doubtless the Judge Advocate General of the Army is 'absent' from this office in the sense of 1132 Revised Statutes and has been so absent since I have been here in charge," and it ended thus: "I am authorized to say that Gen. Crowder himself is entirely agreeable to my calling this matter to your attention." The Acting Chief of Staff, taking this memorandum at its face value, corroborated as it was by certain representations from the officer, which raise a further question of veracity, on the same day made an order designating the officer as Acting Judge Advocate General; but this order was marked for suspended publication until December 9. Meanwhile, neither the order itself, nor any information about it from the officer himself or from any other officer, was brought to the notice of yourself. On November 17, of your own motion, you addressed to me a personal letter, expressing your disinclination

that I should permit my duties as Provost Marshal General to encroach increasingly on my time, and asking whether it would be possible for me to allot my time more liberally to the office of the Judge Advocate General. On November 18, I replied, pointing out that the revision of the Selective Service Regulations, pending during October and November, was now completed and that thereafter I should expect to divide my time in even shares between the two offices. On the same day, November 18, your attention was first called to the unpublished order of November 6, above mentioned, the occasion being the presentation to you by that officer of a list of proposed appointees as judge advocates. Your inquiry of him, whether I had been consulted upon those names, evoked from him the revelation of the existence of that order, which had been obtained by him under the circumstances above mentioned. Neither you nor myself had up to that time been made aware of its existence. Contrary as it was to your own expressed desire in your letter of November 17 to myself, you promptly directed The Adjutant General to revoke it; and that revocation appears of record in the file of The Adjutant General, dated November 19, the next day.

This chronology, taken from each day's records, makes it plain that the revocation of the order was due solely to the fact that the order was obtained surreptitiously without your knowledge and was contrary to your express and recorded intention; that you revoked it the moment you became aware of its existence; and that I myself was not aware of its existence until you informed me.

Meanwhile, however, the memorandum of the officer in question, arising out of the Texas Mutineers' case, and claiming extraordinary powers for the Judge Advocate General, had been prepared by him in this office, but without bringing it to my knowledge. It bears date of November 10, but in the officer's own handwriting; and there is nothing to show when it was transmitted to your office; for it never passed through my hands, nor did it ever come to my knowledge, in any form, nor was the existence of such a memorandum even suspected by me, until after the completion of the entire chronology above set forth. It was on the evening of Friday, November 23, four days after the above order had been revoked by you, that I first received from your hands the memorandum in question, with the request to consider its legal argument for the power therein claimed. During the days of November 24, 25, and 26 I proceeded with a study of the precedents, calling two skilled judge advocates to my assistance, and on Tuesday, November 27, a brief, so dated, was filed with you by me. This brief exposed the legal fallacies of the above officer's memorandum, pointed out its suppression of material and conclusive authorities to the contrary, and expressed the view to which I have ever since adhered, viz., that the power did not exist under present law, and that the only source of remedy would be a grant of power from Congress. On the same day, November 27 you expressed

assent to the views set forth in my brief; and your memorandum concludes: "A frank appeal to the legislature for added power is wiser." This concurrence of views between yourself and myself was reached, I note, on November 27, and not before then.

It is a peculiar coincidence that the above officer's surreptitious act of securing the order designating him as Acting Judge Advocate General took place on November 6; that his brief claiming extraordinary judicial powers for the Judge Advocate General (which had been preparing, as his letter states, since October 18) was withheld until at least a week later than the signing of the order which placed him in the position, as he supposed, to exercise that extraordinary power; and that although the order itself which placed him in office was so managed as to be kept from your knowledge, yet the memorandum which would have added that power to his office was handed directly to you (not to me), and at a time when you still supposed that I was the incumbent, and not he. The coincidence is so remarkable that an inference of deliberate and ambitious planning for personal power, and only for personal power, is unavoidable.

At the risk of being tedious, I have thus set forth from the records the chronology of this episode; for thus alone could these recent public insinuations—reflecting both on your supposed conduct and on mine—be conclusively dispelled. It must now be clear to all that the actual reason for your revocation of the order designating that officer as Acting Judge Advocate General was that it had been surreptitiously obtained and was contrary to your initial and constant intention; that the memorandum claiming for the Judge Advocate General an unauthorized power to correct court-martial errors was not brought to my notice until four days after the above order had been revoked; that your consensus with me as to the unsoundness of that claim was not reached until a week subsequent to that revocation; that therefore the revocation of that order could not possibly have been motivated, either in your mind or in mine, by our failure to accept his views on the subject of the legal powers of the Judge Advocate General; and, in conclusion, that the assertion or insinuation that his appointment was revoked because of your and my opposition to his views as to the proper method of improving the law, is baseless and unjust to us both.

I must, however, continue for a moment on this subject, because the same officer, in his letter of February 17, 1919 (Cong. Record, p. 3983, Feb. 19), makes a second charge of a similar sort, which is not only equally baseless but reveals on his part the same singular methods of manipulation. In that letter, setting forth his continued efforts "to break up such a static and intolerable legal situation," he continues:

> In September (1918), upon my insistent recommendation, power was established in the Acting Judge Advocate General in France to make rulings upon matters of the administration of military justice, in our own forces in France, which would control all commanding generals until overruled by the Secretary of War. This is now being

opposed by the commanding general American Expeditionary Forces, and my own action and propriety in procuring the issue of this order is being subjected to question.

The reference is to General Order No. 84, dated September 11, 1918, amending Section II of General Order No. 7, dated January 17, 1918, the latter being the general order, above referred to, which aimed to avoid the recurrence of such dilemmas as that of the Texas mutineers' case, so far as the Judge Advocate General's powers permitted. The facts are in the first place, that this amending General Order No. 84 was also obtained surreptitiously by the above officre; but in the second place, that it has not been opposed by Gen. Pershing. A brief statement will suffice to show this. The original General Order No. 7, in its Section II, applying to the branch Judge Advocate General's Office in France, directed that office to "report" to the reviewing authority any legal errors, "to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect." The amending General Order No. 84 substituted for the above clause this sentence: "Any sentence or any part thereof, so found to be illegal, defective, or void, in whole or in part, *shall be disapproved, modified, or set aside*, in accordance with the recommendation of the Acting Judge Advocate General (in France)." This amendment was prepared by the officer above referred to. Obviously, its language embodies precisely the grant of mandatory appellate power in the Judge Advocate General for which he had been contending in his brief of November, 1917—a contention which was at that time explicitly repudiated by both yourself and myself; and since February, 1918, the bill above mentioned, curing the defect of law, and granting the power to the President, was still pending in Congress.

Since his return from France in July, 1918, this officer being senior on duty in my office, had the actual supervision of all matters of military justice; the selective draft then requiring my most urgent attention, and the volume of rulings coming from the 50 officers of the military justice division being left entirely for the final signature of the officer in question. He thereupon prepared this amending order, embodying the fundamental principle already expressly repudiated both by you and by me, and took it, not to yourself nor to myself, but directly to the office of the Chief of Staff. The radical nature of the proposed change of rule in this respect was not called to the attention of that office; rather was it represented as involving merely verbal improvements. It issued on September 11; and amidst the mass of other printed general orders, it never came to either your attention or mine until recently. Here, then, was a second attempt to introduce into our overseas practice, surreptitiously, the same unsound assumption of power which had been already squarely rejected nearly a year before.

This sudden and inconsidered introduction of such a fundamental novelty was indeed calculated to evoke objection from the reviewing

authorities in France, more especially from a commander in the field who had been accorded in unprecedented fashion that independence of military action so wisely exercised by Gen. Pershing. The unwisdom of this act, added to its surreptitiousness, was under the circumstances extreme. But it is not true to assert that the order "is now being opposed by the commanding general American Expeditionary Forces." Had it been opposed or protested, this attitude would have been natural enough. On the contrary, no word of such opposition or objection is anywhere on record in my office, nor can any trace of it be found. The only document in which is found any objection on a point of law, on the part of the commanding general in disagreement with the Acting Judge Advocate General in France, is a memorandum of November 14, 1918, raising a question under the Thirty-seventh Article of War. That article, which applies equally at home and in the field, lays down the usual modern rule forbidding that an erroneous ruling on evidence or procedure shall be ground for disapproval unless it affects the susbtantial rights of the accused "in the opinion of the reviewing or confirming authority"; and the contention of Gen. Pershing's judge advocate was that under this statute only the reviewing authority can pass upon the question of insufficiency of evidence as a substantial error. There is no mention of General Order No. 84 in the entire document, nor any reference to its contents. Neither in this nor in any other document yet received from Gen. Pershing's headquarters is there any opposition to General Order No. 84. The insinuation that here again the Army—this time the Army in France—is opposing a beneficent measure of reform in military law is baseless.

The foregoing two instances of a groundless charge that I have opposed the reforming efforts of this officer are intimately connected by him with a third instance equally groundless, in which the misrepresentation has been so significant to the public that I must in this place record its refutation. In the same letter of this officer, published in the Congressional Record, February 19, last, page 3983, column 1, the officer is supposed to be exonerating himself from criticism made on the floor of Congress that he "should have gone directly to the President" when balked in his efforts made within the department. Purporting then to explain the "impossibilities of such a course," he gives as an illustration his action when four sentences of death were pending in the department for confirmation and when this office had recommended execution: "I went to the head of the office," meaning myself, of course, presumably, "and orally presented to him my views in opposition. I then filed with him a memorandum in which I did my best to show what seemed to me to be obvious, that these men had been most unfairly tried, had not been tried at all, and ought not to die or suffer any other punishment upon such records. *Discovering that these memoranda*

had not been presented to the Secretary of War, and feeling justified by the fact that I had no other forum in this department, I gave a copy of the memorandum to a distinguished member of the Judiciary Committee of the House and was told by him that he could present the cases to the President himself." The story as thus told is plausible, and purports to condemn the superior authorities of the War Department, and implies that the subsequent commutation was obtained solely by this outside intervention of a Member of Congress. But a simple perusal of the official files now lying before me demonstrate that the charge is a mere fabrication and a cruel one.

These cases of the sentence of death had been pending during March, 1918, in this office. The several officers in the Division of Military Justice had, after scrutiny, found no legal error, and the record in that condition, *approved by the very officer who now makes this charge*, had been placed in my hands. In the meanwhile, I submitted it informally to more than one other officer, including a judge advocate, not at that time attached to this office, who had taken part in the 1916 revision of the Court-Martial Manual in the chapter upon procedure, witnesses, and evidence, and whose name is well known to the legal profession as an authority on the subject of evidence; the memorandum of the latter disclosed no reason to doubt the adequacy of the proof of the offense. Meantime, also, I had directed further inquiries to be made in my office as to the practice in respect to death sentences for the offense of sleeping on post in the theater of war; for two of the sentences were imposed for the offense of sleeping on post.

On April 5, 1918, my memorandum transmitted the four death cases to Gen. March, Acting Chief of Staff; the memorandum including this statement, "There is a very large question in my mind as to whether clemency should be extended," and calling attention to the express request of the commander in chief in France and of his judge advocate (already alluded to above in this letter) that the death sentences should be confirmed. On April 15 the senior officer on duty in my office (the one now making these charges) presented a memorandum to me, at my request, examining the four cases in detail. In the two cases of sentences for refusal to drill this memorandum refers to the plea of guilty put in by the accused; then, treating together the two cases of Sebastian and Cook, sentenced for sleeping on post, the memorandum continues: "The death penalty in each of these cases was awarded for sleeping on post, after a plea of guilty." The memorandum then goes on: "These cases were not well tried," setting forth the inadequate composition of the court; "those were mere youth; not one made the slightest fight for his life; each was defended by a second lieutenant; such defense as each had was not worthy the name. Were I charged with the defense of such a boy on trial for his life, I would not, while charged with that duty, permit him to make a plea that meant the forfeit of his life." This

memorandum of the officer in question was dated April 15. It was addressed personally to me in rough draft, and was not such a document as is usually prepared, in final form, for transmission beyond the immediate chief. *On the very next day* a document dated April 16, signed by me personally, was filed with the Chief of Staff; it begins: "Since our interview on the four cases from France * * * my attention has been invited to certain facts of which I had no knowledge at the time of the interview and to which I think your attention should be invited." The memorandum then proceeds in the fourth and concluding paragraph as follows: "Permit me finally to observe, without reopening the case, that it will always be a matter of regret to me that the four cases upon which we were called upon to act were not well tried." The memorandum then continues, using almost literally the language of the above officer's memorandum: "Each of the four defendants was a mere youth, and I am a little impressed by the fact that not one of them made a fight for his life. Each of the men was defended by a second lieutenant who made no special plea for them. I regret exceedingly that in each case the accused was allowed to make a plea of guilty. As counsel for them I should have strongly advised that they plead not guilty." It will be observed that this language is almost a literal reproduction of the language of the above officer's memorandum above quoted and filed with me *on the very day before*. On the *very next day*, viz, April 17, the Chief of Staff writes a memorandum to the Secretary of War.

The notable fact of chronology thus is that *within 24 hours* after receiving the memorandum of the senior officer on duty under me, in opposition to the confirmation of these sentences, I myself drafted and sent to the Chief of Staff a memorandum covering the very points mentioned by the above officer and using, in large part, the identical language. Furthermore, within *24 hours more*, or within 48 hours after the memorandum in question was dated, the Chief of Staff had filed a memorandum with the Secretary of War. On May 1 the Secretary of War forwarded the records to the President, recommending clemency, and on May 4 the President remitted, by pardon, the sentence of death for the two men sleeping on post and reduced the sentence of the other two men to three years (for refusal to drill), thus following exactly the recommendation of the Secretary of War, and explicitly thanking the Secretary for his careful presentation of the cases.

Whatever therefore may have been said to the President during this interval by the Member of Congress, it is obvious that the President's action was taken as the culmination of a careful study of the case within the department and of a series of memoranda initiated in my department and following their due course to the Secretary of War; and that this conclusion was the result of the united efforts of all the War Department officials concerned with that subject, in which the rôle of the officer in question was only a minor one, and was at the beginning far from being the humane one.

But the specially notable fact is that I not only incorporated and presented the ideas of the officer in question, but that I was unfortunately thus led into an important blunder of fact through my reliance upon it. In paragraph four of my memorandum I stated, as a ground for doubting the thoroughness of the trial, "in each case the accused *was allowed to make a plea of guilty.*" The Chief of Staff, in his memorandum opposing the extension of clemency, pointed out the blunder as follows: "Referring to paragraph 4 of the memorandum of the Judge Advocate General, I do not find that his statement, 'I regret exceedingly that in each case the accused was allowed to make a plea of guilty,' is a fact; the record shows that two of these men, namely, Private Sebastian and Private Cook, did plead not guilty, and in the cases of the other two men, Privates LeDoyen and Fishback, although the accused pleaded guilty, the court proceeded to take evidence in the cases in spite of that plea." The significant thing about this error in the officer's memorandum was that I, relying implicitly on his memorandum, was led to repeat the same error in my own memorandum for the Chief of Staff, thus furnishing the latter the opening for his destructive criticism above quoted.

It is now apparent that the statement in the officer's above quoted letter of February 19, "discovering that these memoranda had not been presented to the Secretary of War," is not only a gross misrepresentation, in that the very ideas and language of his memorandum were incorporated in my own memorandum, but that this document went forward within twenty-four hours to the Chief of Staff and within forty-eight hours to the Secretary of War, and that these documents were officially on file and could have been inspected in the file at any moment; so that the officer in question must have gone to the Member of Congress without any attempt to discover the facts; and one year later he has published far and wide a defamatory statement which is contrary to facts as they stare out from the face of the official records.

I confess myself unable to comprehend such methods of manipulation in this agitation. Certainly, to cope with them would be endless, and I shall not attempt to continue the refutation of any others of the specific and completely groundless charges reflecting upon my supposed personal attitude.

I close this part of my comments, regretfully entered into by me, with the observation that neither in these nor in any other aspects of this issue of fundamental legal principle has there been exhibited at any time any opposition on my part to measures of real improvement in military law or procedure. The issue here was simply whether the incumbent of my office, whether acting ad interim or for the four-year term of appointment, should be vested with a power which belongs, if anywhere, in the President, and which Congress alone can grant to him. Neither ambition nor any other motive will ever induce me to assent to an illegal and unwise assumption of official power. Apart from this single instance, I have never opposed any

action or proposal of the officer in question directed either to the improvement of military justice in general or to the doing of better justice in an individual case; and this for the simple reason that he has never made any such proposals to me. Except for the period of his absence in France for about 90 days in April–July last, he has been, since August, 1917, the senior officer on duty in my office, with ample opportunity to introduce general improvements of procedure or to remedy individual cases; and the moral responsibility for not initiating whatever might have been done and was not done lies therefore upon him for the greater part of the war period. How ample was that general opportunity to act, unchecked either by me or by yourself, may be plainly seen by the manner in which General Order No. 84, above mentioned, was promulgated in September, 1918. And how little he did in fact avail himself of individual opportunities may be interred from the circumstance that in the three cases recently cited on the floor of Congress as cases of excessively severe sentences in which this office is said to have harshly denied an application for mitigation by clemency (C. M. Nos. 113,076, 115,506, and Robbin's case), the document containing the refusal to recommend clemency bears *in each of the three cases* the signature of that officer himself.

I would have preferred to be spared the recital of these facts. But even as it is I have refrained from the disposal of other specific criticisms, equally groundless, in which personal mention would have been necessary. I have said no more than seemed unavoidable in refuting these unjust inuendoes, now so widely spread that it is perhaps impossible for the truth ever to overtake them.

III. RECOMMENDATIONS.

I have not made my position clear, Mr. Secretary, if I have given the impression that in my opinion there is nothing to change or to improve in our system of military justice. My chief concern in this letter has been to remove the slurs that have been cast upon the whole system as such; to refute by plain facts the extreme and exaggerated criticisms that are calculated to undermine, unjustly and needlessly, the public confidence in that system; and to redeem, if I can assist in doing so, the honor of that admirable band of conscientious and able officers who have been called to share in its administration during the last two years. I would like the American people to know confidently and take pride in the fact that we possess a genuine and adequate system of military justice, founded upon the Constitution of our forefathers and the acts of Congress of our contemporaries—administered in the trial courts by officers required to be familiar with it—and thoroughly scrutinized in its appellate stages by professional lawyers whose sole object is to insure conformity to the requirements of law and to secure the just protection of the accused.

That military justice can not be improved in any details could certainly not be maintained by anyone. But neither does anyone

maintain that civilian justice is perfect. The experience of the last two years, when carefully studied, will doubtless reveal wise measures by which improvements of the military code can be secured. The same is true of each one of our institutions, civil as well as military, that has passed through the crucible of war time. But it will first be necessary to compare divergent opinions, based on differences of local experience, and of important policies. At the present moment there lies before me a voluminous report, in manuscript, representing the collated result of suggestions of improvement, prepared at my request by each one of the officers on duty in my office, as based on his own observation and experience. In its final form this report will be of the greatest value.

Meanwhile, as it is never my preference to remain content with a defensive or critical attitude, but rather to offer constructive measures where apt and necessary, I venture to select a few proposals, representing those which in my judgment offer the greatest promise of benefit and require the least assistance from statutory change. I refrain from explaining at length in this letter the effect of each proposal; it will be fairly obvious to one familiar with the military system.

The specific proposals are as follows:

1. (*a*) By general order amend paragraphs 75 and 76 of the Manual for Courts-Martial relating to submission and investigation of charges, so as to require the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs either to personally conduct the investigation or else to depute it to an officer of experience, preferably not below the rank of captain, and to confront the accused with witnesses, and prepare a summary of the evidence and settle upon it in agreement with the accused, substantially as in the British practice.

(*b*) Amend paragraph 78 of the Manual "Determination of proper trial court" by a general order providing in substance that the officer exercising court-martial jurisdiction shall not order a case to trial until he has received and considered the written opinion of his staff judge advocate or of this office.

The intent of this proposal is, by laying down with greater particularity the duties and responsibilities of investigating officers and of staff judge advocates, to guard against any possibility of (*a*) hasty, ill-considered, or arbitrary action by any commanding officer, (*b*) ordering any person to trial without full and careful, as well as impartial, investigation of the case, and until reasonable probability of his guilt has been shown, or (*c*) trivial cases going before general courts; and also to insure adequate preparation in all cases ordered to trial.

2. (*a*) Amend the forty-fifth article of war by striking out the words "in time of peace."

(*b*) By proper amendments of the Articles of War, so change the composition and increase the importance and the powers of the special court-martial, that (like the British district court-martial) it

may award confinement up to two years with accompanying forfeitures of pay and allowances; and may adjudge a *suspended* sentence of dishonorable discharge, to be suspended until the soldier's release from confinement.

(*c*) Provide by general order further amending the seventy-eighth paragraph of the Manual for Courts-Martial by way of caution to convening authorities, as an expression of the policy of the Government, a direction, substantially in the language of the general order issued January 22, 1919, that "Trial by general court-martial will be ordered only where the punishment that might be imposed by a special or summary court or by the commanding officer under the provisions of the one hundred and fourth article of war would be under all the circumstances of the case clearly inadequate."

I believe the changes included in this proposal would tend powerfully to increase the number of special courts-martial, and correspondingly decrease the general courts, as in the British Army; and thereby automatically to reduce the possibility of unduly severe sentences. Striking the words "in time of peace" out of the forty-fifth article of war, would enable the President to fix the maximum limits of punishments, in war as well as peace.

3. Recognizing the need, in the trial of serious, difficult, and complicated cases of an impartial legal adviser to the trial court; and recognizing also the difficulties involved in the institutions of so far-reaching a change in our system of court-martial procedure, I propose, in order to try out the plan—

(*a*) A general order, modeled after the practice of the British field general court-martial, of appointing an especially qualified member on the court who is required to be present at the trial of all serious, difficult, and complicated cases, this member to be a member of the Judge Advocate General's Department, if one be reasonably available.

4. Adopt either the amendment to Revised Statutes 1199, proposed by the Secretary of War January 19, 1918, which covers the ground more completely and more flexibly than the now pending bills, and also leaves the final power of ultimate decision in the President as Commander in Chief of the Army; or else adopt the plan embodied in the proposed joint resolution sent to Senator McKellar February 20, 1919, which allows the President to "correct, change, reverse, or set aside any sentence of a court-martial found by him to have been erroneously adjudged *whether by error of law or of fact*."

This would supply the needed appellate jurisdiction over court-martial sentences, lacking under existing law, and would place it in the Commander in Chief of the Army, who would normally act on the recommendation of his constituted legal adviser in military matters—the Judge Advocate General.

E. H. CROWDER,
Judge Advocate General.

The SECRETARY OF WAR.

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